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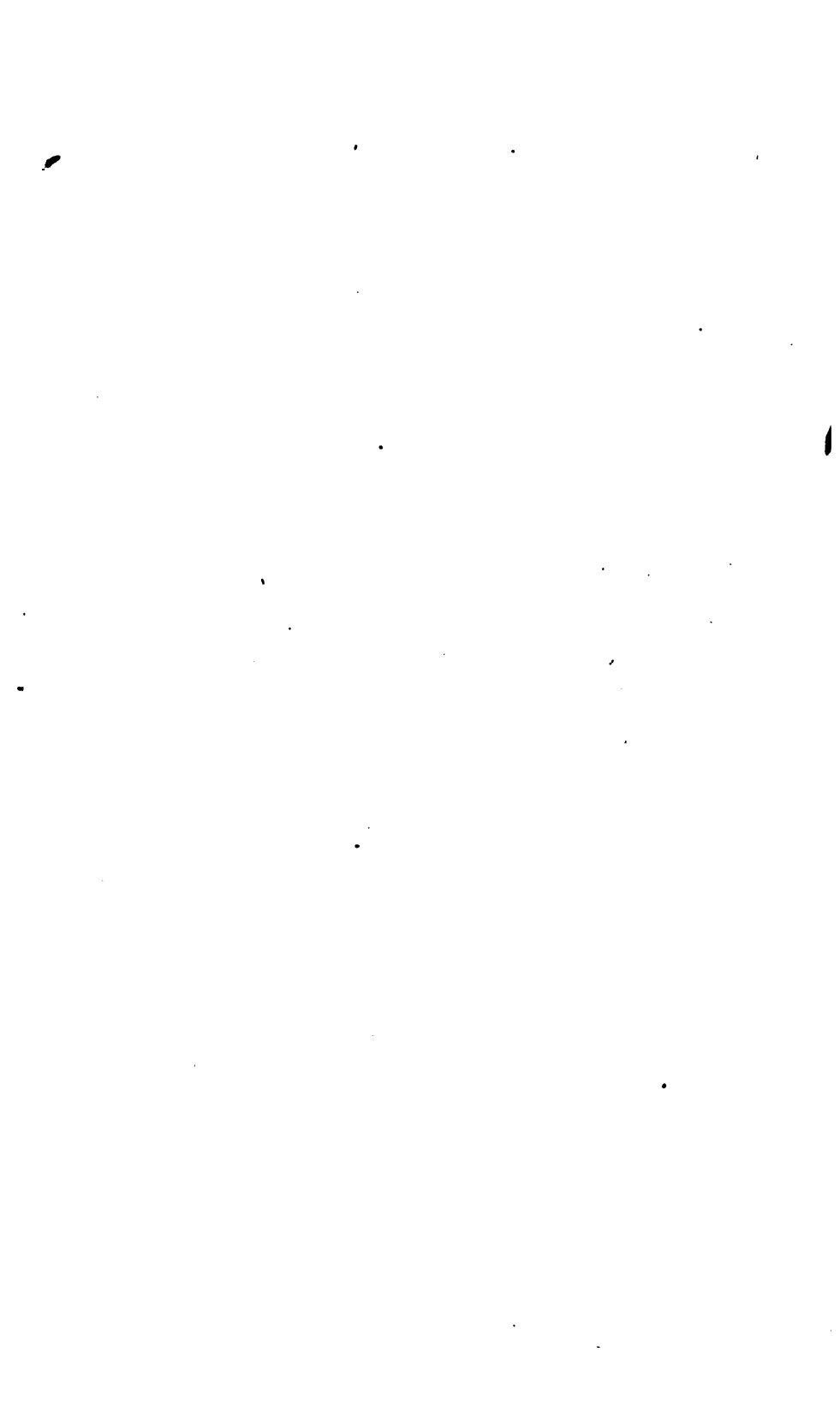






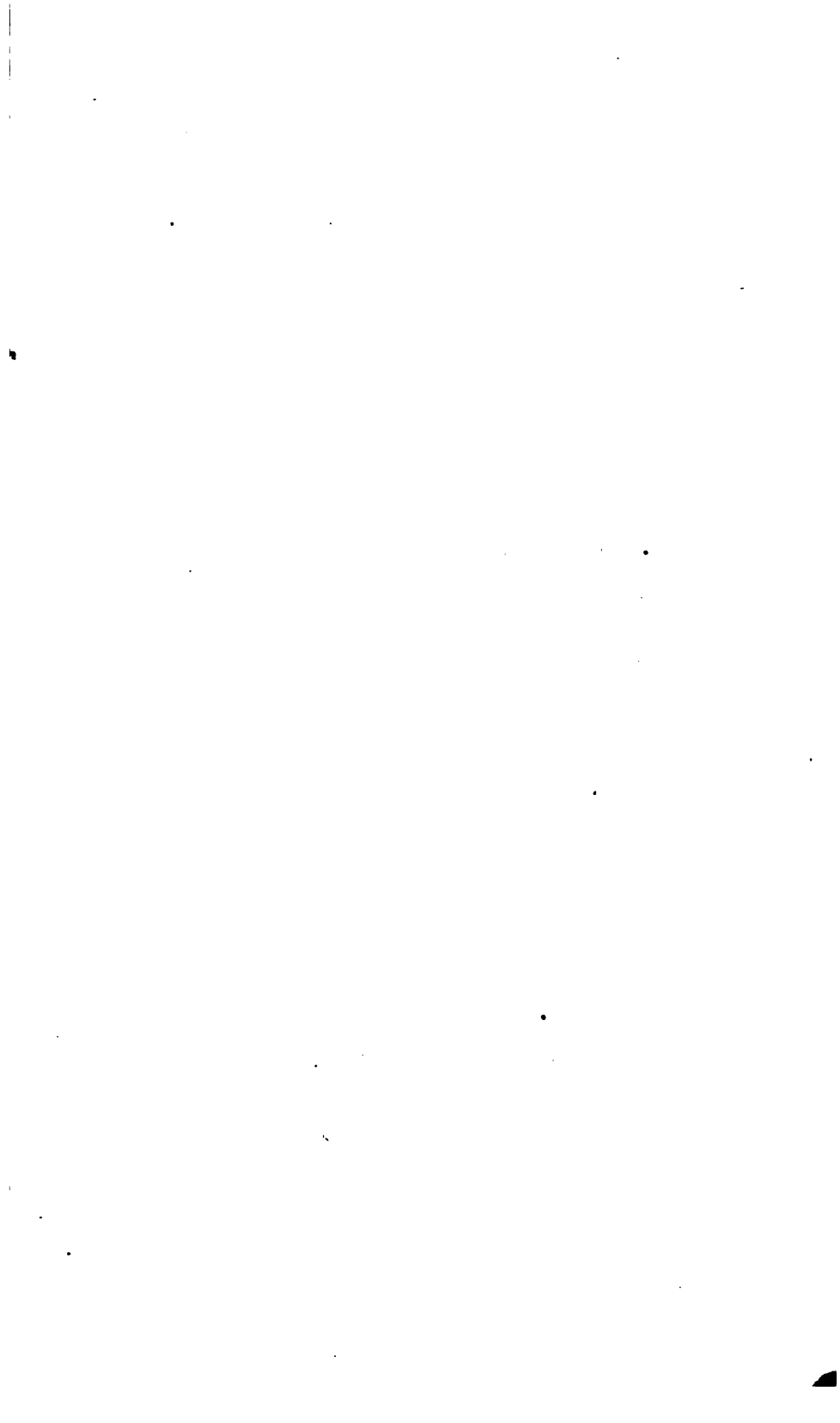
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REPORTS

OF

CASES ARGUED AND DETERMINED

IN THE

SUPREME COURT

OF THE

STATE OF MONTANA

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FROM JUNE 22, 1904, TO JANUARY 25, 1905.

o  
OFFICIAL REPORT.

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VOLUME XXXI.

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The opinions in this volume up to and including the case of State v. Hliboka (page 455), were reported under the supervision of the justices, by Oliver T. Crane, Esquire, prior to his resignation as reporter. The volume was completed by me, under the same supervision.

A. C. SCHNEIDER.

# JUSTICES

OF

## The Supreme Court of the State of Montana,

DURING THE TIME OF THESE REPORTS.

---

THE HON THEO. BRANTLY, Chief Justice.<sup>1</sup>

THE HON. GEORGE R. MILBURN,	}	Associate Justices.
THE HON. WILLIAM L. HOLLOWAY,		

---

### COMMISSIONERS:

HON. JOHN B. CLAYBERG,

HON. LEW. L. CALLAWAY,<sup>2</sup>

HON. W. H. POORMAN.

HON. HENRY N. BLAKE.<sup>3</sup>

---

### OFFICERS OF THE COURT ON NOVEMBER 1, 1905.

ALBERT J. GALEN, Attorney General.

W. H. POORMAN, First Asst. Attorney General.<sup>4</sup>

EDGAR M. HALL, Second Ass't Attorney General.

JOHN T. ATHEY, Clerk.

MARSHALL N. RACE, Marshal.

AUGUST C. SCHNEIDER, Court Stenographer.

---

1.—Re-elected November 8, 1904.

2.—Resignation took effect January 1, 1905.

3.—Appointed January 2, 1905.

4.—Appointed May 1, 1905, vice Frank M. Mettler, resigned.

## ATTORNEYS AND COUNSELORS AT LAW

ADMITTED FROM MARCH 22, 1905, TO JULY 5, 1905.

---

BARTA, JOHN RUDOLPH  
BIRKEN, WILLIAM J.  
GALLUP, GEORGE  
HOLLOWAY, H. H.  
HORKAN, GEORGE A.

PEW, CHARLES E.  
ROBINSON, THOMAS W.  
SULLIVAN, JAMES CHARLES  
TOUGHILL, JAMES B.  
WALLACE, CHARLES A.



# DIRECTORY

OF THE

## Judicial Districts of the State of Montana.

1905

---

### FIRST JUDICIAL DISTRICT.

County of Lewis and Clark. County Seat, Helena.

District Judges: Hon. Henry C. Smith; Hon. James M. Clements.

Officers: County Attorney, Leon A. La Croix, Esq.; Clerk of District Court, Sidney Miller; Sheriff, Peter Scharrenbroich.

### SECOND JUDICIAL DISTRICT.

County of Silver Bow. County Seat, Butte.

District Judges: Hon. John B. McClernan; Hon. George M. Bourquin; Hon. Michael Donlan.

Officers: County Attorney, J. E. Healy, Esq.; Clerk of District Court, W. E. Davies; Sheriff, J. J. Quinn.

### THIRD JUDICIAL DISTRICT.

Counties of Deer Lodge, Powell and Granite.

District Judge, Hon. George B. Winston.

Officers of Deer Lodge County (County Seat, Anaconda)—  
County Attorney, John H. Tolan, Esq.; Clerk of District Court, Ira C. Gnose; Sheriff, T. J. Fleming.

Officers of Powell County (County Seat, Deer Lodge)—  
County Attorney, O'B. O'Bannon, Esq.; Clerk of District Court, R. Lee Kelly; Sheriff, Jas. C. Barnden.

Officers of Granite County (County Seat, Philipsburg)—  
County Attorney, George A. Maywood, Esq.; Clerk of District Court, George O. Burke; Sheriff, Finley McDonald.

## FOURTH JUDICIAL DISTRICT.

Counties of Missoula, Ravalli and Sanders.

District Judge, Hon. F. C. Webster.

Officers of Missoula County (County Seat, Missoula)—County Attorney, W. L. Murphy, Esq.; Clerk of District Court, R. W. Kemp; Sheriff, Davis Graham.

Officers of Ravalli County (County Seat, Hamilton)—County Attorney, C. B. Calkins, Esq.; Clerk of District Court, A. C. Bahn; Sheriff, Wm. F. Cook.

\*Officers of Sanders County (County Seat, Thompson Falls)—County Attorney, H. C. Schultz, Esq.; Clerk of District Court, L. E. Smith; Sheriff, C. E. Baker.

\*County of Sanders created by Act of the Ninth Legislative Assembly (1905), and added to Fourth Judicial District. The Act will take effect March 1, 1906.

## FIFTH JUDICIAL DISTRICT.

Counties of Beaverhead, Jefferson and Madison.

District Judge, Hon. Llewellyn L. Callaway.

Officers of Beaverhead County (County Seat, Dillon)—County Attorney, Henry R. Melton, Esq.; Clerk of District Court, F. A. Hazelbaker; Sheriff, M. L. Gist.

Officers of Jefferson County (County Seat, Boulder)—County Attorney, C. R. Stranahan, Esq.; Clerk of District Court, George Pfaff; Sheriff, A. F. Gibson.

Officers of Madison County (County Seat, Virginia City)—County Attorney, S. V. Stewart, Esq.; Clerk of District Court, J. G. Walker; Sheriff, Charles Kadell.

## SIXTH JUDICIAL DISTRICT.

Counties of Park, Carbon and Sweet Grass.

District Judge, Hon. Frank Henry.

Officers of Park County (County Seat, Livingston)—County Attorney, A. P. Stark, Esq.; Clerk of District Court, Arthur Davis; Sheriff, A. S. Robinson.

Officers of Carbon County (County Seat, Red Lodge)—County Attorney, Sydney Fox, Esq.; Clerk of District Court, E. E. Esselstyn; Sheriff, M. W. Potter.

Officers of Sweet Grass County (County Seat, Big Timber)—County Attorney, J. E. Barbour, Esq.; Clerk of District Court, H. C. Pound; Sheriff, O. A. Falling.

SEVENTH JUDICIAL DISTRICT.

Counties of Yellowstone, Custer, Dawson and Rosebud.

District Judge, Hon. Chas. H. Loud.

Officers of Yellowstone County (County Seat, Billings)—County Attorney, H. L. Wilson, Esq.; Clerk of District Court, F. H. Foster; Sheriff, W. P. Adams.

Officers of Custer County (County Seat, Miles City)—County Attorney, T. J. Porter, Esq.; Clerk of District Court, A. T. McAusland; Sheriff, W. E. Savage.

Officers of Dawson County (County Seat, Glendive)—County Attorney, C. C. Hurley, Esq.; Clerk of District Court, Harry Sample; Sheriff, G. W. Wolloams.

Officers of Rosebud County (County Seat, Forsyth)—County Attorney, J. C. Lyndes, Esq.; Clerk of District Court, D. J. Muri; Sheriff, J. Z. Northway.

EIGHTH JUDICIAL DISTRICT.

County of Cascade. County Seat, Great Falls.

District Judge, Hon. Jere B. Leslie.

Officers: County Attorney, H. S. Green, Esq.; Clerk of District Court, Chas. P. Proctor; Sheriff, Edward Hogan.

NINTH JUDICIAL DISTRICT.

Counties of Gallatin and Broadwater.\*

District Judge, Hon. W. R. C. Stewart.

Officers of Gallatin County (County Seat, Bozeman)—County Attorney, A. J. Walrath, Esq.; Clerk of District Court, C. B. Anderson; Sheriff, E. M. Reynolds.

Officers of Broadwater County (County Seat, Townsend)—County Attorney, J. A. Matthews, Esq.; Clerk of District Court, F. Bubser; Sheriff, J. W. Munden.

\*By Act of the Ninth Legislative Assembly (1905) Meagher County was detached from the Ninth and added to the Tenth Judicial District.

## TENTH JUDICIAL DISTRICT.

Counties of Fergus and Meagher.\*

District Judge, Hon. E. K. Cheadle.

Officers of Fergus County (County Seat, Lewistown)—  
County Attorney, R. E. Ayers, Esq.; Clerk of District Court,  
J. B. Ritch; Sheriff, L. P. Slater.

Officers of Meagher County (County Seat, White Sulphur  
Springs)—County Attorney N. B. Smith, Esq.; Clerk of Dis-  
trict Court, A. C. Grande; Sheriff, C. H. Sherman.

\*Meagher County added to Tenth Judicial District by Act of Ninth  
Legislative Assembly (1905).

## ELEVENTH JUDICIAL DISTRICT.

Counties of Flathead and Teton.

District Judge, Hon. John E. Erickson.

Officers of Flathead County (County Seat, Kalispell)—  
County Attorney, W. T. McKeown, Esq.; Clerk of District  
Court, J. K. Lang; Sheriff, O. P. Gregg.

Officers of Teton County (County Seat, Chouteau)—  
County Attorney, P. I. Cole, Esq.; Clerk of District Court,  
S. McDonald; Sheriff, K. McKenzie.

## TWELFTH JUDICIAL DISTRICT.

Counties of Chouteau and Valley.

District Judge, Hon. John W. Tattan.

Officers of Chouteau County (County Seat, Fort Benton)—  
County Attorney, Chas. N. Pray, Esq.; Clerk of District Court,  
C. H. Boyle; Sheriff, Frank McDonald.

Officers of Valley County (County Seat, Glasgow)—County  
Attorney, J. J. Kerr, Esq.; Clerk of District Court, C. C.  
Beede; Sheriff, W. S. Griffith.



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## **SUPREME COURT RULES.**

For Rules of the Supreme Court of the State of Montana, promulgated February 1, 1905, see Vol. XXX, Montana Reports, page xxix.



# CASES DETERMINED

## IN THE

# SUPREME COURT

AT THE  
JUNE TERM, 1904.

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THE HON. THEO. BRANTLY, Chief Justice.

THE HON. GEORGE R. MILBURN,

THE HON. WILLIAM L. HOLLOWAY,

}

Associate Justices.

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COMMISSIONERS:

HON. JOHN B. CLAYBERG,  
HON. LEW. L. CALLAWAY,  
HON. W. H. POORMAN.

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STATE, RESPONDENT, v. ROGERS, APPELLANT.

(No. 2,039.)

(Submitted May 25, 1904. Decided June 22, 1904.)

31	1
e34	256
31	1
e39	178
31	1
d40	135
40	251
e40	252

*Burglary — Information—Description of Premises—Witnesses*  
*Cross-Examination—Degradng and Discrediting Witness.*

1. The court cannot take judicial notice of the system employed by cities in numbering houses, nor of the relative location of buildings, nor whether there are buildings on certain lots and blocks.
2. Where an information for burglary charges the willful entry of a certain house in the rear of No. 111 East Broadway street, owned by J. K., and it

appears the house burglarized was No. 111 and occupied by M. K., but was situated on the rear of the lot, and there was no other house thereon, accused was not prejudiced by the description or the evidence of ownership.

3. Under Penal Code, Section 1842, providing that no information is insufficient, nor can the judgment be affected for any imperfection in matter of form, which does not prejudice defendant's substantial rights on the merits, a conviction for burglary will not be disturbed because it appears it was committed on a day prior to that alleged in the information, where defendant was not prejudiced.
4. Where certain witnesses for defendants in a prosecution for burglary testified that defendants resided with their mother at Centerville, it was not erroneous to allow them to be cross-examined as to whether or not defendants had been arrested in a house in Butte, or did not maintain a room there, as showing that they resided there instead of with their mother.
5. Where a witness for the prosecution made statements as to what he had heard, and an objection to a further question was sustained because the witness was not testifying from his own knowledge, the ruling practically withdrew the answer to the previous question, and defendant, if he desired a more specific withdrawal, ought to have moved to strike the evidence from the record.
6. Where, in a prosecution for burglary, a witness who was jointly indicted with defendant testified to having taken a fishing trip with defendant about the time of the burglary, questions on cross-examination to show that the trip was for the purpose of committing robbery were improper, as tending to degrade and discredit the witness and defendant, though the witness answered in the negative.

*Appeal from District Court, Silver Bow County; John B. McLernan, Judge.*

JOE ROGERS was convicted of burglary, and he appeals. Reversed.

*Mr. William Meyer, and Mr. Alexander Mackel, for Appellant.*

*Mr. James Donovan, Attorney General, for the State.*

MR. COMMISSIONER POORMAN prepared the following opinion for the court:

According to the transcript, Joe Rogers and Pat Rogers were jointly informed against for burglary. The transcript does not contain any record of any trial or conviction of Pat Rogers. Joe Rogers, however, was tried and convicted, and subsequently made a motion for a new trial, which was overruled. Pat Rogers now appeals from the order of the court overruling this

motion for a new trial, and Joe Rogers appeals only from the judgment of conviction made and entered against him. There being no record of any trial or conviction of Pat Rogers, his appeal will be disregarded, and the statement on motion for a new trial made by Joe Rogers will be treated, so far as applicable, as a bill of exceptions in aid of his appeal from the judgment.

1. It is alleged in the information that the defendants did, on June 25, 1903, "willfully," etc., "enter that certain house situate in the rear of No. 111 East Broadway street \* \* \* owned by one John Kovacevich, \* \* \* with intent \* \* \* the goods, chattels \* \* \* of said John Kovacevich \* \* \* to steal," etc. The evidence is to the effect that the house burglarized was No. 111 East Broadway, and at the time of the burglary was occupied by Michael Kovacevich, who owned property therein, but that the property actually stolen belonged to one Willoczjakske, and was in charge of Michael Kovacevich. On motion of the county attorney the court ordered the information amended by "changing the name from John to Michael Kovacevich." It also appears that this house was situated on the rear of the lot, and that there was no other house thereon. The defendant insists that there is a variance between the proof and the allegations of the information. The entry of a building with the intent to commit a larceny or some felony is all that by the statute is made essential to the crime of burglary. (Section 820, Penal Code.) The gravamen of the charge is the entry with this criminal intent. The particular ownership of the goods in the building, and the ownership and the location of the building entered, are only matters of description. This court cannot take judicial notice of the system employed by cities in numbering houses, nor of the relative location of buildings, nor whether there are buildings on certain lots and blocks. The description appears to have been inserted in the information on the theory that the number "111" applied to the front of the lot, and, the building being on the rear of the lot, it was proper to designate it as being in the rear of that number. There

is no evidence that there were other buildings in that immediate vicinity.

"An indictment is sufficient if it can be understood therefrom that the offense was committed at some place within the jurisdiction of the court," etc. (Subdivision 4, Section 1841, Penal Code.)

In another part of the information it is alleged that the crime was committed at Silver Bow county, Montana. The defendant could not have been prejudiced by this description, or this evidence of ownership. The facts disclosed by this record indicate with sufficient exactness the location of the building entered.

2. It appeared from the evidence that the burglary was committed on June 17th, instead of June 25th, as alleged in the information. Section 1837, Penal Code, reads: "The precise time at which an offense was committed need not be stated in the indictment or information, but it may be alleged to have been committed at any time before the finding or filing thereof, except where the time is a material ingredient in the offense." Unless time is a material ingredient in the offense or in charging the same (Section 1581, Penal Code), it is only necessary to prove that it was committed prior to the finding or filing of the information or indictment. Similar statutes have been construed in this manner in the following cases: *People v. Sheldon*, 68 Cal. 434, 9 Pac. 457; *State v. Thompson*, 10 Mont. 549, 27 Pac. 349; *People v. La Fuente*, 6 Cal. 202; *People v. Littlefield*, 5 Cal. 355; *State v. Harp*, 31 Kan. 498, 3 Pac. 432; *State v. Williams*, 13 Wash. 338, 43 Pac. 15; *Rema v. State*, 52 Neb. 375, 72 N. W. 474; *United States v. Conrad* (C. C.), 59 Fed. 458.

Where it is alleged in an information that a crime was committed on a certain day, and the prosecution then proves another day, the defense of the defendant, if an alibi, might thereby be practically destroyed; the defendant might not be prepared to prove an alibi as to any day except that named in the information. But the defendant in such a case may protect himself by asking for permission to subpoena other witnesses, or, if neces-



sary, to ask for a continuance, and the action of the court thereon would then become a proper subject for review on appeal. (*Smith v. Shook*, 30 Mont. 30, 75 Pac. 513.) It does not appear from the record that the defendant made any such request in this case. Section 1842 of the Penal Code provides that no indictment or information is insufficient, nor can the trial, judgment, or other proceeding thereon be affected, by reason of any defect or imperfection in matter of form which does not tend to the prejudice of a substantial right of the defendant upon its merits. From the facts as they appear in this record, the defendant was not prejudiced.

3. During the trial counsel for the state asked several of the defendant's witnesses as to whether or not the Rogers boys had been arrested in a room in the Hoffman House, or did not maintain a room in that house. These witnesses had not testified as to the arrest of the defendants, but had testified that neither of the defendants was in Butte between the 14th and 26th days of June; that they lived with their mother at Centerville. The object of the cross-examination was undoubtedly to show, if possible, that the defendants resided at the Hoffman House, in Butte, instead of with their mother at Centerville, and might therefore have been within the city without their mother or the other witnesses knowing it. Pat Rogers, in testifying as a witness on behalf of his brother, Joe Rogers, stated on his direct examination that he and his brother, Joe, were arrested in a room in the Hoffman House, and explained the purpose of their being there, and defendant admitted that he was arrested there. There was no error in permitting this cross-examination.

4. The sheriff of Silver Bow county, when called as a witness on the part of the state, testified that he was acquainted with the defendant Joe Rogers, "and that he has been in my charge as sheriff of Silver Bow county since last July." When asked as to whether or not the defendant had attempted to escape from custody, the witness said: "Well, I know that he escaped, Mr.

Breen. That is what I heard; I was not there at the time it happened. Q. Do you know that it occurred?" Both these questions were objected to by counsel for defendant, and the objection sustained as to the last question on the ground that the witness was not testifying from his own knowledge. This ruling of the court practically withdrew from the consideration of the jury the answer to the previous question. Had the defendant desired a more specific withdrawal, he should have made a motion to strike the evidence from the record, which he did not do. There is no error in the rulings of the court with reference to these questions.

5. Defendant's witness Pat Rogers testified as to a fishing trip of himself and brother from Butte, via Anaconda, to Storm lake; that they left Butte June 14th, and did not return until June 26th. On cross-examination by the state's counsel it developed that both of the defendants named in the information went by stage from Anaconda to Cable, thence to Storm lake; that the only purpose of going to Cable was to see the town, as the witness had not been there before, and had heard much of the place. It was in evidence that the parties had taken with them two pistols and one shotgun, in addition to fishing tackle, bedding and provisions. The witness was then asked: "Is it not a fact that when you went to Cable—when you took that trip—that your object was to find out when the bullion was to be shipped from Cable?" The witness testified that he had ordered a Lee straight-pull gun from Chicago for hunting purposes, but did not have it with him. This further question was then asked: "Now, Mr. Rogers, didn't you get that Lee straight-pull rifle for the purpose of holding up the bullion that was going from the Cable mine?" Both of these questions were objected to as incompetent, irrelevant and immaterial, and as having nothing to do with the case. The objections were overruled, and the witness answered in the negative. It is claimed that the court erred in overruling these objections; that the questions have a direct tendency to degrade the witness and his

brother, the defendant, in the eyes of the jury. The witness of whom these questions were asked was a brother of the defendant, and was jointly informed against with the defendant, and, according to the testimony, the two brothers had taken this trip for a common purpose. If it could therefore be made to appear to the jury that Pat Rogers had gone to Cable for the purpose of committing a robbery, such evidence would reflect equally upon the defendant, Joe Rogers.

It is a rule well established in this state that when an accused becomes a witness in his own behalf, and denies that he committed the crime for which he is on trial, a wide latitude of cross-examination is permissible, owing to the general nature of the defendant's statements. Upon the cross-examination of such witness such deflections from the matter brought out on direct examination are allowed as may be necessary to bring the whole matter involved in the direct examination before the court, and to extract the whole of the truth concerning the matter brought forward by the accused. (*State v. Howard*, 30 Mont. 518, 77 Pac. 50; *State v. Duncan*, 7 Wash. 336, 35 Pac. 117, 38 Am. St. Rep. 888; *People v. Mullings*, 83 Cal. 138, 23 Pac. 229, 17 Am. St. Rep. 223; *People v. Morton*, 139 Cal. 719, 73 Pac. 609.)

A witness, whether the accused or any other witness, may be discredited in any of the various ways named in the statute or sanctioned by law, but it is not permissible to ask any witness any question merely for the purpose of degrading him. It is the right of a witness to be protected from irrelevant, improper and insulting questions (Section 3402, Code of Civil Procedure), and he need not give an answer which will have a tendency to subject him to punishment for a felony or to degrade his character, unless it be to the very fact in issue, or to a fact from which the facts in issue would be presumed. (Section 3401, *Id.*) These questions were totally foreign to the matter before the court, and could have no bearing whatsoever on the guilt or innocence of the defendant of the crime with which he

was accused by the information. They could therefore subserve no purpose whatsoever except to degrade and discredit the witness and his brother, the defendant, in the eyes of the jury.

It is not presumed that state's counsel, being charged with the protection of the rights of all citizens, would accuse a witness of having committed a crime unless he had some evidence of the truth of the accusation. The questions, therefore, would convey the impression to the jury that the state's counsel had reason to believe that the defendant went to Cable for the purpose of committing a robbery. The fact that it was not intended to prejudice the defendant, or that the questions only accused the defendant of the intent to commit a crime, or that the negative answers of the witness were conclusive upon the state, could not free the questions of their objectionable character. It was certainly not to be expected that they would be answered in the affirmative.

In *People v. Mullings*, 83 Cal. 138, 23 Pac. 229, 17 Am. St. Rep. 223, the court said: "It is quite evident that the *questions*, and *not the answers*, were what the prosecution thought important. The purpose of the questions, clearly, was to keep persistently before the jury the assumption of damaging facts which could not be proven, and thus impress upon their minds the probability of the existence of the assumed facts upon which the questions were based."

In *State v. Gleim*, 17 Mont. 17, 41 Pac. 998, 31 L. R. A. 294, 52 Am. St. Rep. 655, this court laid down the rule that such questions are improper and prejudicial. The reasons therefor are discussed in the opinion of the court in that case, and are also elaborately discussed in *People v. Wells*, 100 Cal. 459, 34 Pac. 1078, and it is unnecessary to repeat the discussion here. We cannot recommend that the rule in the *Gleim Case* should be reversed. The same questions are also discussed in *People v. Un Dong*, 106 Cal. 83, 39 Pac. 12; *Estate of James*, 124 Cal. 653, 57 Pac. 578, 1008; *People v. Crandall*, 125 Cal. 129, 57 Pac. 785; *Gale v. People*, 26 Mich. 161; *People v.*

*Cahoon*, 88 Mich. 456, 50 N. W. 384; *Leahy v. State*, 31 Neb. 566, 48 N. W. 390; *State v. Trott*, 36 Mo. App. 29.

*Matusevitz v. Hughes*, 26 Mont. 214, 68 Pac. 468, cited by respondent, is not in point on this proposition. There the witness had voluntarily, in part of his testimony, stated that he had been arrested. On cross-examination he was asked, "What were you charged with at that time? What were you arrested for?" This question the court held was not prejudicial.

We think this judgment should be reversed, and the case remanded for a new trial.

PER CURIAM.—For the reasons given in the foregoing opinion, the judgment is reversed, and the case remanded for a new trial.

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DAWES, RESPONDENT, v. CITY OF GREAT FALLS,  
APPELLANT.

31	9
38	240

31	9
40	396

(No. 1,896.)

(Submitted April 30, 1904. Decided June 27, 1904.)

*Municipal Corporations — Defective Sidewalks—Personal Injuries—Action—Demand—Nonsuit—Appeal—Record.*

1. Where defendant's motion for new trial was denied, and he appealed from the judgment alone, assignments of error referring to instructions, not in the record as a part of the judgment roll, but in the statement on motion for new trial, cannot be considered.
2. Political Code, Sections 4811, 4812, requiring all accounts and demands against a city to be presented to the council, itemized and accompanied by affidavit with necessary vouchers, etc., within one year from the date the same accrued, and barring claims not so presented, do not apply to a claim for damages arising from personal injuries.
3. Where an appeal is from the judgment, and not from the order overruling the motion for new trial, the court will not determine the sufficiency of the evidence, but only determine whether there is any evidence to support the judgment.
4. On appeal the court will not consider the question of alleged variance between the proof and complaint, not called to the attention of the court below.
5. Upon a motion for nonsuit, everything is deemed proved which the evidence tends to prove.

*Appeal from District Court, Cascade County; J. B. Leslie, Judge.*

ACTION by E. A. Dawes against the city of Great Falls. Judgment for plaintiff, and defendant appeals. Affirmed.

*Mr. J. W. Freeman, and Mr. Sam Stephenson, for Appellant.*

The first error upon which appellant relies is that the court erred in overruling defendant's motion for a nonsuit. There are four reasons why this motion should have been sustained.

First. The complaint does not allege, and there is no proof, that the plaintiff presented his demand against the city in accordance with Sections 4811 and 4812 of the Political Code. We contend that this is a demand against the city such as is contemplated by these two sections, and the city council had a right to pass upon the plaintiff's claim before he instituted an action.

Second. The second reason why the motion should have been sustained is that there is a fatal variance between the allegations of the complaint and the proof. It is alleged in the complaint that the city dug the excavation complained of. The proof shows that the excavation was not made by the city, or any of its officers or agents, but that the excavation was made at the instance of the abutting property holder by Murphy-MacLay Company, who were licensed drain layers in the city and over whom the city had no more control than it had over any other person occupying or using the street. The complaint alleges that the plaintiff was injured by reason of stepping into the excavation. By his own testimony he admitted that he was injured by slipping upon the sidewalk some three feet away from the excavation, and that, in trying to catch himself, he fell into the excavation. The complaint alleges that the defendant did not know of the excavation. By his own testimony he admitted that he had seen the excavation every day for a long time previous thereto, and that he knew of its existence at the time that

he was hurt. Counsel contend that the city cannot be held liable for permitting an excavation to remain in the street, which was made by a third party, upon a complaint which alleges that the excavation was made by the city, and for the reasons above stated we think that the variances between the allegations of the complaint and the proof are fatal to the action.

Third. The third reason why the motion for nonsuit should have been granted is that it appears from the evidence in the transcript, which has already been pointed out in the statement of facts, that the alleged excavation in the street was not the proximate cause of plaintiff's injury. (*Herr v. Lebanon*, 10 L. R. A. 106; *Smith v. Kanawha County*, 8 L. R. A. 82.)

Fourth. The fourth reason why the motion for nonsuit should have been sustained is that the evidence shows conclusively that the plaintiff had knowledge of the excavation in the street; that he could have easily avoided the same, and that he acted in such a manner as to have been negligent himself and to have himself assumed the risk, if any. (*City of Bloomington v. Rogers*, 36 N. E. 439; *Corlett v. City of Leavenworth*, 27 Kan. 673; *Parkhill v. Town of Brighton*, 15 N. W. 853; *Davis v. California St. R. Co.*, 105 Cal. 131; *Town of Mt. Vernon v. Dusouchett*, 55 Am. Dec. 467; *Walker v. Town of Reidsville*, 2 S. E. 74; *Hesser v. Grafton*, 11 S. E. 211.)

*Mr. J. A. McDonough*, and *Mr. J. A. Largent*, for Respondent.

MR. COMMISSIONER CLAYBERG prepared the following opinion for the court:

Appeal by the city of Great Falls from a judgment of \$1,000 entered against it.

The cause of action stated in the complaint is based upon the alleged negligence of the city in making a dangerous excavation in one of its streets, and negligently allowing such excavation to remain in a dangerous condition, with full knowledge of such

condition, whereby plaintiff was injured by falling into the same. The answer denied all the allegations of the complaint, except that of its corporate character, and set forth as an affirmative defense the contributory negligence of plaintiff. The replication denied all the allegations of the answer.

A trial was had by the court with a jury, which resulted in a verdict and judgment in favor of plaintiff for the sum of \$1,000 damages. The defendant moved for a new trial, which was denied, and afterwards appealed from the judgment alone. At the close of plaintiff's evidence, defendant's attorney made a motion for nonsuit, which was overruled.

Appellant assigns eight errors, the first of which is the overruling of the motion for nonsuit; the second to the seventh, inclusive, are to the giving of certain instructions to the jury; and the eighth based upon the reason that the complaint does not state facts sufficient to constitute a cause of action.

Under the decisions of this court, assignments of error 2 to 7 cannot be considered, because they all refer to instructions of the court, and these instructions are not in the record as a part of the judgment roll, but in the statement on motion for a new trial. (*Butte M. & M. Co. v. Kenyon*, 30 Mont. 314, 76 Pac. 696; *Shropshire v. Sidebottom*, 30 Mont. 406, 76 Pac. 941; *Glarin v. Lane*, 29 Mont. 228, 74 Pac. 406; *Featherman v. Granite County*, 28 Mont. 462, 72 Pac. 972.) While the rule thus announced may seem harsh in certain instances, and savor considerably of technicality, it is based upon our statutes, and in no instance can it work a hardship if the attorneys preparing the record on appeal give this preparation proper attention. Further, this court announced to the profession in the *Featherman Case*, *supra*, that "counsel may, upon timely application to the court, upon suggestion of diminution, amend their records."

This leaves only two questions for consideration, viz.: (1) Does the complaint state facts sufficient to constitute a cause of action? and (2) Did the court err in overruling the motion for a nonsuit?



1. Of the complaint: The only ground of insufficiency charged is "that there is no allegation that the demand of plaintiff was ever presented to the city council, as required by the provisions of Sections 4811 and 4812 of the Political Code." These two sections are as follows:

"Sec. 4811. All accounts and demands against a city or town must be submitted to the council, and if found correct must be allowed, and an order made that the demand be paid, upon which the mayor must draw a warrant upon the treasurer in favor of the owner, specifying for what purpose and by what authority it is issued, and out of what fund it is to be paid, and the treasurer must pay the same out of the proper fund.

"Sec. 4812. All accounts and demands against a city or town must be presented to the council, duly itemized and accompanied by an affidavit of the party or his agent, stating the same to be a true and correct account against the city or town for the full amount for which the same is presented, and that the same accrued as set forth, and with all necessary and proper vouchers, within one year from the date the same accrued; and any claim or demand not so presented within the time aforesaid is forever barred, and the council has no authority to allow any account or demand not so presented, nor must any action be maintained against the city or town for or on account of any demand or claim against the same, until such demand or claim has first been presented to the council for action thereon."

It is apparent from these two sections that the requirement that "all accounts and demands" against the city should be submitted to the council was for the purpose of allowing the city to *audit* such accounts and demands and direct their payment. This purpose could not apply to a claim for damages arising from a tort. It would be difficult to present a demand arising out of a tort under the provisions of these two sections. The great weight of authority as to legislative provisions of the character of these two sections is that they do not apply to demands arising out of torts, but simply to accounts and demands upon

contracts. (*Adams v. City of Modesto*, 131 Cal. 501, 63 Pac. 1083; *Sutton v. City of Snohomish*, 11 Wash. 24, 39 Pac. 273, 48 Am. St. Rep. 847; *Kelley v. City of Madison*, 43 Wis. 638, 28 Am. Rep. 576; *Lay v. City of Adrian*, 75 Mich. 438, 42 N. W. 959; *City of Warren v. Davis*, 43 Ohio St. 447, 3 N. E. 301; *Sheridan v. City of Salem*, 14 Ore. 328, 12 Pac. 925; *McGaffin v. City of Cohoes*, 74 N. Y. 387, 30 Am. Rep. 307; *Howell v. City of Buffalo*, 15 N. Y. 512; *Pomfrey v. Village of Saratoga Springs*, 104 N. Y. 459, 11 N. E. 43.)

A full discussion of the principles involved in this application of these sections is found in the above-cited authorities, and it would serve no useful purpose to repeat the same in this opinion.

2. As to the motion for nonsuit: The motion for nonsuit was based upon the following grounds: "(1) The evidence conclusively shows that the plaintiff was guilty of contributory negligence. (2) That there is no evidence of defendant's negligence. (3) That the evidence introduced is not sufficient to entitle plaintiff to a verdict. (4) For the reason that the facts stated in the complaint are not sufficient to support the judgment in this action." In the argument of the error assigned on the overruling of this motion, counsel takes four positions, some of which were not urged in the court below. They are as follows: (1) Insufficiency of the complaint, because it does not allege compliance with Sections 4811 and 4812 of the Political Code. (2) There was a fatal variance between the proof and the allegations of the complaint. (3) Because the evidence does not disclose that the excavation was the proximate cause of plaintiff's injury. (4) Because the evidence conclusively showed that plaintiff had knowledge of the excavation of the street, that he could have easily avoided the same, and that he acted negligently.

Upon motions for nonsuit, everything is deemed proved which the evidence tends to prove, and no such motion should be granted unless the facts disclosed are such that all reasonable men must draw the conclusion from them that the plaintiff cannot

recover. (*Nord v. Boston & Montana Consol. C. & S. Mining Co.*, 30 Mont. 48, 75 Pac. 681, and cases cited.) We have examined plaintiff's evidence given prior to the making of this motion, and are satisfied that it tended to show facts sufficient to sustain his cause of action. It made a *prima facie* case. We cannot consider the question of the sufficiency of the evidence, because the appeal is from the judgment, and not from the order overruling the motion for new trial. (*Withers v. Kemper*, 25 Mont. 432, 65 Pac. 422.) This court can only examine the evidence to determine the legal question whether there is any evidence to support the judgment.

Neither can we consider the question of the alleged variance between the proof and the complaint, as this point was not called to the attention of the court below. Had it been, and the court below found such variance, it might have permitted an amendment to the complaint.

Therefore it follows that the only error assigned upon the correctness of the ruling on this motion is that the complaint does not state facts sufficient to constitute a cause of action. We have considered this proposition fully above, and are satisfied that the complaint does state sufficient facts to constitute a cause of action.

We therefore recommend that the judgment appealed from be affirmed.

PER CURIAM.—For the reasons stated in the foregoing opinion, the judgment is affirmed.

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LANDT ET AL., APPELLANTS, v. SCHNEIDER, RESPONDENT.

(No. 1,907.)

(Submitted May 27, 1904. Decided June 27, 1904.)

*Landlord and Tenant—Lease — Abandonment—Warranties—  
Obligation to Repair—Statutes—Application — Evidence—*

*Extension of Lease—Acts of Attorney—Written Authority—  
Statute of Frauds—Appeal.*

1. Leaving the key to a leased building at the lessor's place of business over his protest, and in spite of his refusal to accept a surrender of the premises demised, is not such an acceptance by the lessor as will relieve the lessee from the payment of rent.
2. In the absence of statute or agreement, there is no implied warranty that leased premises are suitable for the purpose for which they are demised.
3. In the absence of statute or agreement, there is no implied warranty that the lessor will keep the leased property in repair.
4. Civil Code, Sections 2620, 2621, providing that, where a leased building is intended for the occupation of human beings, the lessor must, in the absence of agreement to the contrary, put the same in a condition fit for habitation, and repair subsequent dilapidations, etc., does not apply to business property, but is limited in its application to property used for dwelling-house purposes.
5. Where there was nothing contained in the description of property in a lease by which it could be determined from the lease itself whether it was intended for occupation by human beings or not, which was one of the issues made by the pleadings, parol evidence was admissible to explain the purpose for which the property was leased, together with its condition and description.
6. A letter written subsequent to the beginning of an action for rent, which did not by its terms ratify any previous act of one of the lessors, was in admissible for the purpose of showing authority on his part to make a previous agreement with the lessee on behalf of the other lessors.
7. A letter written by R. and B., two lessors, to the third lessor, to the effect that they had concluded that R. should go to the place where the third resided, and agree concerning the leased premises, was inadmissible to show that R. had authority to extend the lease as agent of B.
8. Where one of several lessors of a building had no written authority to sign an extension agreement containing an agreement for a conveyance of the land, for one of the other lessors, as required by Civil Code, Section 2185, Subdivision 5, such extension agreement, which was for more than a year, was invalid.
9. Where it did not appear that the appeal record contained all the evidence introduced at the trial, or the substance thereof applicable to the errors assigned, the supreme court could not review the sufficiency of the evidence to sustain the verdict.

*Appeal from District Court, Fergus County; E. K. Cheadle, Judge.*

ACTION by Louis Landt and others against E. G. Schneider. From a judgment in favor of defendant, and from an order overruling a motion for a new trial, plaintiffs appeal. Affirmed.

*Messrs. Blackford & Blackford, and Mr. T. J. Walsh, for Appellants.*

MR. COMMISSIONER POORMAN prepared the following opinion for the court:

On February 26, 1900, the plaintiffs, Landt, Ritter and Buxman, leased to defendant, Schneider, and one Fleiner certain property for the term of one year. Schneider acquired the interest of Fleiner in the lease, and on the 10th of September, 1900, it was agreed between plaintiffs and defendant, Schneider, that the time of the lease should be extended for an additional year from the 26th day of February, 1901. Schneider occupied the premises until the 25th day of February, 1901. This action was to obtain a judgment against Schneider for the rent claimed to be due for the time named in the extension of the lease. Trial by jury. Verdict and judgment for defendant. Appeal from the judgment and from an order overruling plaintiffs' motion for a new trial.

The defense is to the effect: (a) That defendant surrendered the possession of the premises at the close of one year, and that plaintiff Landt accepted the same. (b) That the buildings leased were occupied, and intended to be occupied, by human beings; that the same had become unfit for such occupancy; that the lessors had been notified, and had failed and refused to make repairs.

1. Where material facts relative to the surrender to and acceptance by the lessor of leased premises are in dispute, the question thus presented is to be determined by the jury; but in this case, for reasons hereinafter stated, we can only say generally that leaving the key of the leased building at the lessor's place of business over the protest of the lessor, and in spite of his refusal to accept the premises demised, is not such an acceptance by the lessor as will relieve the lessee from the payment of rent. (*Blake v. Dick*, 15 Mont. 236, 38 Pac. 1072, 48 Am. St. Rep. 671.)

2. It is an elementary principle of law that, in the absence of a statute or agreement, there is no implied warranty that leased premises are suitable for the purposes for which they are

demised, or that the lessor will keep the property in repair. (*York v. Steward*, 21 Mont. 515, 55 Pac. 29, 43 L. R. A. 125; *Petz v. Voigt Brewery Co.*, 116 Mich. 418, 74 N. W. 651, 72 Am. St. Rep. 531; *Davidson v. Fischer*, 11 Colo. 583, 7 Am. St. Rep. 267, and note; *Minneapolis C. Co. v. Williamson*, 51 Minn. 53, 38 Am. St. Rep. 473, and note; *Hines v. Willcox*, 34 L. R. A. 824, note, 96 Tenn. 148.)

Sections 2620, 2621, Civil Code, provide, however, that, where the building leased is intended for the use and occupation of human beings, the lessor must, in the absence of an agreement to the contrary, put it in a condition fit for such occupation, and must repair all subsequent dilapidations, etc.; that, if he does not make such repairs within a reasonable time after notice, the lessee may repair the same, where the cost does not exceed one month's rent, or may vacate the premises, in which case the lessee shall be discharged from the further payment of rent.

The decision in *York v. Steward*, above cited, was based on a state of facts arising prior to the enactment of this statute, and merely holds to the common-law doctrine, without making reference to the statute, though the decision was not rendered until subsequent to the enactment of the sections above referred to. This statute, however, is confined to property used for dwelling-house purposes, and is not applicable to business property. (*Edmison v. Aslesen*, 4 Dak. 145, 27 N. W. 82; *Minneapolis C. Co. v. Williamson*, *supra*.)

3. The lease between the parties describes the property as "the Maiden brewery plant \* \* \* comprising about four and one-half acres of ground, together with the brewery building and machinery and appliances and appurtenances thereto belonging or in any wise appertaining." The written agreement extending the lease does not give any further description of the property leased. It was denied in the answer that the lessor had any land, and alleged that the building was situate upon government land. No proof, so far as this record shows,

appears to have been introduced upon this subject by either party. There is nothing in the description of the property contained in the lease by which it can be determined from the lease itself whether it was intended for occupation by human beings or not, and this was one of the issues made by the pleadings. Parol evidence was admissible under these issues to explain the purposes for which the property was leased, and, as incidental thereto, its condition and description, and the court did not err in admitting such evidence.

4. The court refused to admit in evidence a letter which was offered by plaintiffs for the purpose of showing that Landt had authority to act for and on behalf of plaintiff Buxman with reference to leasing this property. This letter was written by Buxman to Landt subsequent to the beginning of this action, and does not by its terms ratify any previous act of the plaintiff Landt; and the same is also true of plaintiffs' Exhibit A, which is the power of attorney executed subsequent to the commencement of the suit, but does not by its terms relate to or ratify past transactions.

5. Plaintiffs' Exhibit C was a letter written by Buxman to Landt, dated prior to the written extension of the lease, containing this statement: "We (Ritter and Buxman) have concluded that Mr. Ritter goes to your place and all what he agrees about the brewery in Maiden is all right with me." This letter is signed by George Buxman. Plaintiffs sought to show by this letter that Ritter had authority to enter into the agreement of September 10th extending the lease as the agent of Buxman. The court refused to admit the letter. This letter is a statement by plaintiff Buxman to plaintiff Landt, and does not purport to grant written authority to Ritter to contract for and on behalf of Buxman.

Subdivision 5, Section 2185, Civil Code, provides that an agreement for leasing for a longer period than one year, or for the sale of real property, or for an interest therein, must be in writing, and such agreement, if made by an agent, is invalid,

unless the authority of the agent be in writing, subscribed by the principal sought to be charged.

Section 1504, Civil Code, provides that, when an attorney in fact executes an instrument transferring an interest in real property, he must subscribe the name of his principal to it, and his own name as attorney in fact.

Ritter had no written authority, as appears from this record, to contract for Buxman; nor is Buxman's name signed to the agreement extending the time of this lease. This lease and agreement of extension also embody an agreement for the sale and conveyance of this land to defendant. Under the facts here presented, this alleged agreement of Buxman amounts to nothing more than a parol agreement to extend the terms of the written lease and agreement to convey for more than one year beyond the date when the contract of extension was entered into.

In *Delano v. Montague*, 4 Cush. 42, the court says, in substance, that a parol agreement between the parties to a lease in writing, entered into before the expiration of the lease, that the lessee would take the premises for another year on the same terms, is within the statute of frauds, as an agreement not to be performed within a year, and no action can be maintained thereon.

The agreement extending the terms of this written lease as to plaintiff Buxman is within the statute of frauds (Subd. 5, Sec. 2185, Civil Code), and is wholly void. It is not such an agreement as the defendant could have enforced against the plaintiff Buxman.

Query: Whether this did not invalidate plaintiffs' entire cause of action?

6. Appellants also claim that the evidence is insufficient to sustain the verdict, and this assignment appears to have been intended as presenting the real issues on this appeal. The record, however, does not positively or even inferentially disclose that it contains all the evidence introduced at the trial thereof, or the substance thereof bearing upon the errors as-



signed. This court has so many times decided that, in order to present a question of this character, the record must disclose all the evidence introduced at the trial below, or its substance, applicable to the errors assigned, that the rule is now *stare decisis*, and we cannot recommend that it be changed. A collection of the cases on this point may be found in *King v. Pony Gold M. Co.*, 28 Mont. 74, 72 Pac. 309.

We therefore recommend that this judgment and order be affirmed.

PER CURIAM.—For the reasons stated in the foregoing opinion, the judgment and order are affirmed.

GLASS ET AL., APPELLANTS, v. BASIN & BAY STATE  
MINING COMPANY, RESPONDENT.

(No. 1,904.)

(Submitted May 27, 1904. Decided June 27, 1904.)

*Pleading — Complaint — Claim and Delivery — Conversion —  
Contract — Breach — Actions.*

1. Plaintiffs alleged that, being owners of certain capital stock in defendant company, they deposited it with the company, to be sold by defendant, and the proceeds used in paying its debts, in consideration of an agreement that plaintiffs should hold the offices of vice president, trustee and general manager and treasurer of the defendant until its business should be in successful operation; that defendant violated its agreement, and ejected plaintiffs from said offices, and had sold and issued the stock to others, and refused and failed to deliver it to the plaintiffs, or to pay plaintiffs the value thereof, though requested to do so. The prayer was for recovery of the possession of the stock, or its value in case delivery could not be had. *Held*, that the complaint did not state a cause of action in claim and delivery, as the statement that defendant had disposed of the stock showed that, at the commencement of the action, defendant did not wrongfully retain possession of the property from plaintiffs.
2. The complaint did not state a cause of action in conversion, as it did not show a general or special ownership in the property and a right to immediate possession at the time of the wrongful taking by defendant.

31	21
31	95
31	21
34	93

31	21
39	275
39	276
31	21
40	470

3. Plaintiffs could not recover as on a contract, as the alleged contract was illegal, under Civil Code, Section 431, requiring directors of the corporation to be elected annually by the stockholders or members, and Section 2240, declaring that unlawful which is contrary to an express provision of the law.
4. Plaintiffs could not recover as on a disaffirmance of an illegal contract, as the complaint showed performance on their part, and reliance on the contract.

*Appeal from District Court, Jefferson County; M. H. Parker, Judge.*

ACTION by James Glass and another against the Basin & Bay State Mining Company. Judgment for defendant, and plaintiffs appeal. Affirmed.

*Mr. T. J. Walsh, for Appellants.*

The respondent having sold the stock, the appellants can have no judgment for its return, but they are clearly entitled to a judgment against the respondent for its value. It is conceded that the promise on the part of the respondent that the appellants should have the offices they then held is void. It had no power to make any such promise. Accordingly, it received and appropriated appellants' stock without consideration and must pay the value of it. An implied promise is raised by the law as against it that it will so pay the appellants. From briefs on file it is gathered that the contention was made by the respondent that because the contract was illegal, the property turned over to the defendant pursuant to it could not be recovered. But this position clearly cannot be maintained. There was nothing immoral in the contract—it was simply beyond the power of the corporation to make it. But if it were immoral, the action is not brought to enforce, but in repudiation of the contract. That money paid upon an illegal consideration, or upon a promise to do a thing forbidden by the law, may be recovered, is familiar law. (*Bateman v. Robinson*, 11 N. W. 736; *Simmons v. Yuran*, 9 N. W. 690; *Foulker v. San Diego*, 51 Cal. 365; *Farmers' L. & T. Co. v. St. Joseph*, 2 Fed. 117;

*Tracy v. Talmage*, 14 N. Y. 162, 180, 181, 216; *Pratt v. Shot*, 79 N. Y. 437-445; *Morawetz on Private Corp.*, Sec. 721; *Congress v. Knowlton*, 103 U. S. 49; *Logan County v. Townsend*, 139 U. S. 67; *Pullman v. Central Transp. Co.*, 65 Fed. 158; *Pimental v. City of San Francisco*, 21 Cal. 352-361; *Nugent v. Teachout*, 35 N. W. 254; *Miller v. Tracy*, 56 N. W. 866.)

A recovery can be had of money or property delivered pursuant to a contract void for want of power to execute it, or because it contravenes public policy, unless it involves moral turpitude on the part of the parties while it remains wholly or in part unexecuted. (5 Thompson on Corporations, 6004; *Pullman Co. v. C. T. Co.*, 65 Fed. 158, 171 U. S. 151; *Heironimus v. Sweeney*, 33 L. R. A. 99; *Block v. Darling*, 140 U. S. 234; *McCutcheon v. Merz*, 71 Fed. 787; *Douglas v. Kavanaugh*, 90 Fed. 373; *Bernard v. Taylor*, 18 L. R. A. 859; *Barcus v. Gates*, 89 Fed. 783-790; *Beasley v. Texas*, 115 Fed. 952; *Manchester v. Lawrence*, 9 L. R. A. 689.)

A contract is not necessarily immoral because it is contrary to public policy. (*Wortman v. Mont. Cent. Ry. Co.*, 22 Mont. 266; *Tate v. Com. B. A.*, 45 L. R. A. 243.) Though the contract considered by the court in *Congress v. Knowlton*, 103 U. S. 49, was held to be illegal, the court said there was nothing immoral about it.

In support of the argument made in the brief of respondent, it is said that the law is that a party who enters into a wagering contract cannot recover the amount from the stakeholder after the determination of the event made the basis of the wager. The overwhelming weight of authority is to the effect that he may recover either before or after, and any time prior to the stakeholder's turning over the money to the winner, and even after he has done so, if he has given notice to the stakeholder before turning the money over, not to do so. (Clark on Contracts, 495, and cases cited.) The tendency of the decisions is clearly shown in a late decision by the Supreme Court of the State of California, in which it is held that money placed in

the hands of one to be used for a positively corrupt purpose may be recovered from the person with whom it is deposited at any time before it is applied to the immoral use. (*Wasserman v. Sloss*, 117 Cal. 433.)

As the appellants have no *property* which they acquired under the contract, there is nothing they can or need restore as a condition of rescission. (*Johnson v. Central Ins. Co.*, 39 Mich. 33; *Foss v. Hildreth*, 10 Allen, 76.)

*Messrs. Toole & Bach*, and *Mr. Ira D. Wight*, for Respondent.

This is an action to recover for the breach of a contract, and not, as alleged in appellants' brief, an action to rescind a contract. If we are right in the contention that this is an action to recover for the breach of a contract, then we need go no further in this case, for appellants admit that the contract is absolutely "void," and it is a well-established principle of law, and in fact admitted by appellants, that a recovery cannot be had under a void contract, or for a breach of it. (*Dung v. Parker*, 52 N. Y. 496.) The general rule of law is, that a contract made in violation of a statute is void; and that when a plaintiff cannot establish his cause of action without relying upon an illegal contract, he cannot recover. (*Miller v. Ammon*, 145 U. S. 426; *Pollock's Principles of Contracts*, pp. 253-260; *Perun v. Borumann*, 102 Ill. 523; *Alexander v. O'Donnell*, 12 Kan. 608; *Each on Contracts*, Sec. 1453; *Harris v. Runnels*, 12 How. 79.)

"There can be no civil right where there can be no legal remedy, and there can be no legal remedy for that which is itself illegal." (*Bank v. Owens*, 2 Pet. 527; *Melchoir v. McCarthy*, 31 Wis. 252; *Schmidt v. Baker*, 87 Am. Dec. 527.)

"There can be no confirmation of a void contract; nor will it constitute an adequate consideration for a new one." (*McIntosh v. Lee*, 57 Iowa, 356; *Murphy v. Jones*, 7 Ind. 529; *Bishop on Contracts*, Sec. 614.)

"The performance of a void contract may produce consequences not void; as, if one voluntarily and with full knowledge of the facts pays money on it, he cannot recover the money back." (Bishop on Contracts, Sec. 615; *Woodburn v. Stout*, 28 Ind. 77; *Babcock v. Fond du Lac*, 58 Wis. 230.)

"Though a contract is without consideration, yet, if it is voluntarily and with full knowledge of the facts executed, the property in the thing, whether money or a chattel, is transferred and it cannot be reclaimed." (*Matthews v. Smith*, 67 N. C. 374; Bishop on Contracts, Sec. 81; *Knowlton v. Congress Empire Springs Co.*, 57 N. Y. 518.)

"To the success of a lawsuit two elements are always essential, namely, a right in the plaintiff, and a correlative wrong in the defendant. And the plaintiff must be without fault in the thing of which he complains, and defendant must be in fault." (*Smith v. Cedar Rapids R. R.*, 43 Iowa, 239; *Rawson v. Clark*, 70 Ill. 656; *Coulter v. Board of Ed.*, 63 N. Y. 365; *Buffkin v. Baird*, 73 N. C. 283.)

This contract is void and contrary to public policy. (Civil Code, Secs. 2240, 437, 431; Beach on Contracts, Sec. 1441; *Guernsey v. Cook*, 120 Mass. 501; *Woodruff v. Wentworth*, 133 Mass. 309; *Harris v. Scott*, 32 Atl. 770; *West v. Camden*, 135 U. S. 507; *Wilbur v. Stoepel*, 82 Mich. 344; *Jones v. Scudder*, 2 Cin. Sup. Ct. 178; *Noyes v. Marsh*, 123 Mass. 286; *Martin v. Wade*, 37 Cal. 168; *Noel v. Drake*, 42 Am. Rep. 162; 15 Am. and Eng. Ency. Law, pp. 939, 945, 948; *Gibbs v. Consolidated Gas Co.*, 130 U. S. 396; *Gardner v. Tatum*, 81 Cal. 370; *Ladda v. Hawley*, 57 Cal. 51; *Swanger v. Mayberry*, 59 Cal. 91; *Baltimore, etc. v. Faunce*, 46 Am. Dec. 655; *Holt v. Green*, 13 Am. Rep. 737; *Ohio L. I. & T. Co. v. Merchants, etc.*, 53 Am. Dec. 742; *Swan v. Scott*, 11 Serg. & Rawle, 164; *Thomas v. Brady*, 10 Bar. 170; *Scott v. Duffy*, 2 Harris, 20; *Mitchell v. Smith*, 1 Binn. 118; *Scidenhender v. Charles*, 4 Serg. & R. 159; *Coppel v. Hall*, 7 Wall. 558; *Warren v. M. I. Co.*, 13 Pick. 521; *Woods v. Armstrong*, 54 Ala. 150; *Bank of*

*U. S. v. Owens*, 2 Pet. 527, 539; *Edwards v. Estelle*, 48 Cal. 194; *Tappan v. Albany B. Co.*, 80 Cal. 570; *Mequire v. Corwine*, 101 U. S. 108.)

The parties are in *pari delicto*. "Where parties unite and are equally implicated in a transaction to defraud others, or which is immoral, illegal or against public policy, the courts will not enforce it, nor relieve either party from its consequences." (*Creath v. Sims*, 46 U. S. 191; *Heineman v. Newman*, 21 Am. Rep. 279; *Winston v. McFarland*, 22 Ill. 38; *Tobey v. Robinson*, 99 Ill. 222; *St. Louis, etc. v. Mathers*, 104 Ill. 257; *Swain v. Russell*, 10 Ind. 438; *Shipley v. Reasoner*, 45 N. W. 1077; *Buchtella v. Stepanek*, 36 Pac. 749; *Smead v. Williamson*, 55 Ky. 492; *Campbell v. Anderson*, 63 Ky. 384; *Denton v. Erwin*, 6 La. Ann. 317; *Green v. Godfrey*, 44 Me. 25; *Materne v. Horwitz*, 101 N. Y. 469; *York v. Merritt*, 77 N. C. 213; *Emery v. Ohio Candle Co.*, 47 Ohio St. 320; *Conolly v. Cunningham*, 2 Wash. 242; *Wight v. Rindskopf*, 43 Wis. 344; *Chitty on Contracts* (10 Am. Ed.), 732; *Johnson v. Willis*, 7 Gray, 164; *King v. Green*, 6 Allen, 139; *Worcester v. Eaton*, 11 Mass. 368; *Knowlton v. C. & E. S. M. Co.*, 57 N. Y. 518; *Levet v. Creditors*, 22 La. Am. 105; *Hovey v. Storer*, 63 Me. 486; *White v. Hunter*, 23 N. H. 128; *Hill v. Freeman*, 73 Ala. 200; *Adams v. Barrett*, 15 Ga. 404; *Andrews v. Marshall*, 48 Me. 26; *Myers v. Meinrath*, 101 Mass. 366; *Perkins v. Savage*, 15 Wend. 412; *Hooker v. De Polas*, 28 Ohio St. 251; *Merwin v. Huntington*, 2 Conn. 209; *Nudd v. Burnett*, 14 Ind. 25; *Tyler v. Smith*, 57 Ky. 793; *Copley v. Berry*, 12 Rob. 79; *Groton v. Waldborough*, 11 Me. 306; *Babcock v. Thompson*, 20 Mass. 446; *Mills v. Western Bank*, 64 Mass. 22; *Hoover v. Pierce*, 26 Miss. 627; *Hall v. Castello*, 48 N. H. 176; *Ellicott v. Chamberlin*, 38 N. J. Eq. 604; *Burt v. Place*, 6 Cow. 431; *Catawba & Co. v. Setzer*, 70 N. C. 426; *Yeager v. Rains*, 23 Tenn. 259; *McEwen v. Shannon*, 64 Vt. 583; *Miller v. Larson*, 19 Wis. 463; Civil Code, Secs. 2150, 2151, 2153, 2162, 2163; *Gridley v. Dorn*, 57 Cal. 78; *St. Louis, etc. v. Terre Haute, etc.*,

145 U. S. 393, 12 Sup. Ct. 953; *Higgins v. McUrea*, 116 U. S. 671, 6 Sup. Ct. 557; *Fish v. Atwood*, 191 Mass. 363; *Setter v. Alvey*, 15 Kan. 126; *Cox v. Witham*, 66 N. Y. 712; *John v. Larson*, 28 Wis. 604; *Schmidt v. Barker*, 17 La. Ann. 261; *Melchoir v. McCarthy*, 31 Wis. 252.)

It is impossible to place the parties in *statu quo*. (Civil Code, Sec. 2273.) The party desiring to rescind must do so promptly upon discovering the facts entitling him to such course. (*Marston v. Simpson*, 54 Cal. 189; *Bartfield v. Price*, 40 Cal. 535; *Upton v. Trebilecock*, 91 U. S. 45.) The party seeking to rescind must restore or offer to restore what has been received under the contract. (*Watts v. White*, 13 Cal. 321; *Winton v. Spring*, 18 Cal. 451; *Herman v. Heffenegger*, 54 Cal. 161; *Miller v. Steen*, 30 Cal. 402; *Fitz v. Bynum*, 55 Cal. 459.)

MR. COMMISSIONER CALLAWAY prepared the following opinion for the court:

The lower court sustained defendant's motion for a judgment on the pleadings, and plaintiffs appeal.

The determinative question is, does the complaint state a cause of action? It alleges the corporate capacity of the defendant, and states that on or about the 15th day of August, 1895, the plaintiffs, then being the joint owners of 1,425 shares of the capital stock of the defendant, at the instance and request of the defendant deposited with the treasurer of the defendant 1,400 shares of said capital stock, of the par value of \$140,000, and of that actual value in money, "to be sold by the defendant, and the proceeds thereof to be used by the defendant in paying its debts and liabilities, as well as its current expenses, in consideration whereof the defendant then and there agreed" that the plaintiff James Glass should hold the offices of vice president, trustee and general manager of the defendant until the mining, concentrating and smelting business of the defendant should be in successful operation, and that the plaintiff Alexander J. Glass should have and hold the offices of trustee and

treasurer of the defendant until the business of the corporation should be in successful operation as aforesaid; that there was no other consideration moving the plaintiffs to deposit the said stock with the defendant; that the business of the defendant has never yet been in successful or other operation, but that the defendant, in violation of its agreement, on or about the 20th of October, 1899, ousted and ejected plaintiffs from said offices, and ever since has refused and now refuses to permit the plaintiffs to have, hold or enjoy the same, by reason whereof the consideration whereby the defendant secured the stock "has, through the wrongful acts of the defendant, wholly failed;" that the defendant has sold and issued all of the stock to other stockholders, and disposed of the same; that the defendant has wholly failed and refused, and now does fail and refuse, to redeliver the stock to the plaintiffs, or to pay the plaintiffs the value thereof, although often requested so to do by the plaintiffs. Other allegations in the complaint are immaterial to this inquiry. The plaintiffs pray for the recovery of the possession of the stock, or for the sum of \$140,000, the value thereof, in case delivery cannot be had, and for costs of suit.

At the outset we are called upon to determine, if possible, the nature of the action. In attempting to do so we shall bear in mind that, under the Code procedure, distinct forms of action are abolished. The only question is, does the complaint state a cause of action? It is the substance of the pleading, and not its legal verbiage, which must determine the question. Though the Code has abolished all forms of action, and provides that there shall be but one form of civil action for the enforcement or protection of private rights and the redress or prevention of private wrongs (Code of Civil Procedure, Section 460), yet the distinctions between the different causes of action still obtain—the reasons underlying them are still the same—and the plaintiff may not recover beyond the case stated by him in his complaint. (*Bixel v. Bixel*, 107 Ind. 534, 8 N. E. 614, and cases cited.)



From the relief prayed for, it would seem that the pleader intended this action for one in claim and delivery, which is an action to recover specific personal chattels, wrongfully taken and detained, or wrongfully detained, with damages for the wrongful detention. (*Fredericks v. Tracy*, 98 Cal. 658, 33 Pac. 750.) The gist of the action is the wrongful detention of the property. (*Hynes v. Barnes*, 30 Mont. 25, 75 Pac. 523.) The value of the property is recoverable only when a delivery of the specific property cannot be had. (*Hunt v. Robinson*, 11 Cal. 262; *Riciotto v. Clement*, 94 Cal. 105, 29 Pac. 414.) In such an action it is necessary to state that the plaintiff has either a general or special ownership in the property, with the right to its immediate possession, at the time of the commencement of the action. (*Fredericks v. Tracy*, *supra*; *Affierbach v. McGovern*, 79 Cal. 269, 21 Pac. 837; *Williams v. Ashe*, 111 Cal. 180, 43 Pac. 595; *Holly v. Heiskell*, 112 Cal. 174, 44 Pac. 466; *Bank of Woodland v. Duncan*, 117 Cal. 412, 49 Pac. 414; *Melton v. McDonald*, 2 Mo. 45, 22 Am. Dec. 437; *Noble v. Epperly*, 6 Ind. 414.) The rule stated in *First National Bank v. McAndrews*, 7 Mont. 150, 14 Pac. 763, is inaccurate, as inspection will show.

The complaint fails to allege these necessary facts. However, it does show affirmatively that, when the action was begun, the defendant had sold and disposed of the stock. This alone would be fatal to the action as one in claim and delivery, for it is essential for the plaintiffs to allege and prove that at the commencement of the action the defendant wrongfully detained the possession of the property from them. (*Riciotto v. Clement*, *supra*; *Henderson v. Hart*, 122 Cal. 332, 54 Pac. 1110; *Gardner v. Brown*, 22 Nev. 156, 37 Pac. 240; *Herzberg v. Sachse*, 60 Md. 426.) "It is the condition and situation of things when the suit is commenced which furnish the grounds for the action." (*Aber v. Bratton*, 60 Mich. 357, 27 N. W. 564, and cases cited; *Burt v. Burt*, 41 Mich. 82, 1 N. W. 936.) Whoever has the possession of the property to be replevied, and unlawfully detains it, is the proper person to be sued. (*Rose v.*

*Cash*, 58 Ind. 278.) It is clear that, from what the complaint fails to show and does show, it does not state a cause of action in claim and delivery.

Does it state a cause of action in conversion? To recover in such an action, the plaintiffs must show a general or special ownership in the chattels, and a right to their immediate possession, at the time of the wrongful taking by defendant. (*Wetzel v. Power*, 5 Mont. 214, 2 Pac. 338; *Sawyer v. Robertson*, 11 Mont. 416, 28 Pac. 456; *Reardon v. Patterson*, 19 Mont. 231, 47 Pac. 956; *Babcock v. Caldwell*, 22 Mont. 460, 56 Pac. 1081; *Harrington v. Stromberg-Mullins Co.*, 29 Mont. 157, 74 Pac. 413.) The complaint makes no such showing, and it fails to state that the defendant has converted the property. "A conversion is any unauthorized act which deprives a man of his property permanently or for an indefinite time." (*Union S. Y. & T. Co. v. Mallory S. & Z. Co.*, 157 Ill. 554, 41 N. E. 888, 48 Am. St. Rep. 341.) "Any distinct act of dominion wrongfully exerted over one's property in denial of his right, or inconsistent with it, is a conversion." (Cooley on Torts, 428.)

Was the sale and disposal of the stock by the defendant unauthorized or wrongful? The complaint answers the question in the negative. It recites that plaintiffs deposited their stock with defendant to enable the latter to pay its debts and current expenses. The defendant sold and disposed of the stock, and presumably applied the proceeds to the purposes intended when the stock was received from the plaintiffs. No other conclusion can be drawn from the wording of the complaint. And it does not appear but that these acts were done while the plaintiffs were holding the offices mentioned in the contract, and actively assented thereto.

Having determined that the complaint neither states a cause of action in claim and delivery nor in conversion, we will look to it to see whether plaintiffs may recover upon the contract. The plaintiffs concede the contract to be void, but do not indi-

cate upon what ground they make such concession. In examining the subject, we find that Section 431 of the Civil Code provides that the directors of a corporation must be elected annually by the stockholders or members. By the contract pleaded, it was agreed that the plaintiffs should be trustees (directors) until the business of the defendant should be in successful operation. Over four years elapsed, and yet it is alleged "that the business of the defendant has never yet been in successful or other operation." Section 2240 of the Civil Code reads: "That is not lawful which is (1) contrary to an express provision of law; (2) contrary to the policy of express law, though not expressly prohibited; or (3) otherwise contrary to good morals." It thus appears that this contract is void and unlawful, as being directly contrary to an express provision of law, in so far as it provides for the plaintiffs to succeed themselves as trustees indefinitely; and, in so far as it provides that the plaintiffs shall have a like tenure of the offices of general manager and treasurer of the corporation, it is within the inhibition of the second and third provisions of Section 2240. Similar contracts have frequently been declared void as against public policy. (*West v. Camden*, 135 U. S. 507, 10 Sup. Ct. 838, 34 L. Ed. 254; *Noel v. Drake*, 28 Kan. 265, 42 Am. Rep. 162; *Guernsey v. Cook*, 120 Mass. 501; *Noyes v. Marsh*, 123 Mass. 286; *Woodruff v. Wentworth*, 133 Mass. 309; *Forbes v. McDonald*, 54 Cal. 98; *Wilbur v. Stoepel*, 82 Mich. 344, 46 N. W. 724, 21 Am. St. Rep. 568.)

In *Swanger v. Mayberry*, 59 Cal. 91, the court said: "The general principle is well established that a contract founded on an illegal consideration, or which is made for the purpose of furthering any matter or thing prohibited by statute, or to aid or assist any party therein, is void. This rule applies to every contract which is founded on a transaction *malum in se*, or which is prohibited by statute, on the ground of public policy. *Ladda v. Hawley*, 57 Cal. 51; *Warren v. M. I. Co.*, 13 Pick. 521, 25 Am. Dec. 341; *Mitchell v. Smith*, 1 Bin. 118, 2 Am.

Dec. 417; *Holt v. Green*, 73 Pa. 198, 13 Am. Rep. 737; *Woods v. Armstrong*, 54 Ala. 150, 25 Am. Rep. 671."

In *Gardner v. Tatum*, 81 Cal. 370, 22 Pac. 880, the court quoted the foregoing language from *Swanger v. Mayberry*, and continued: "This principle is in accord with the express provision of our Civil Code which makes that unlawful which is either contrary to the express provision of law, or 'contrary to the policy of express law, though not expressly prohibited.' Civil Code, Section 1667." (See note to *Parsons v. Trask*, 66 Am. Dec. 506.) Section 1667, referred to, is identical with Section 2240, *supra*. (And see Sections 2150, 2151, 2153, 2162 and 2163, Civil Code.)

The complaint contains no suggestion that the plaintiffs have repudiated the contract, nor any facts from which a repudiation thereof by them may be deduced. On the contrary, they allege that their side of the contract has been fully executed, but that the defendant ousted and ejected them from the offices they held and were to hold by virtue of the contract, and refused and still refuses to permit them to hold and enjoy the same. They characterize these acts of defendant as being a violation of the contract and as wrongful.

The following language from the opinion in *Williamson v. C., R. I. & P. R. R. Co.*, 53 Iowa, 126, 4 N. W. 870, 36 Am. Rep. 206, is pertinent here: "In this case the plaintiffs have fully performed the contract on their part. On their side the contract has been executed. The action is not brought in disaffirmance of their contract. Upon the contrary, they allege a full performance of the contract upon their part, and a breach of the contract upon the part of the defendant. It is upon this breach that they predicate their right to recover. Their action is upon the contract. \* \* \* We feel fully satisfied that for a breach of the contract, as alleged and proven, no damages are recoverable."

The facts in the case from which we have just quoted were that the plaintiffs procured the conveyance to the defendant of

certain lots in the city of Des Moines upon consideration of a promise by defendant that it would build thereon passenger and freight depots, which should be the only ones built or maintained by it in said city. Defendant built and maintained both passenger and freight depots thereon, but, having also built a depot in another part of the city, an action was brought by plaintiffs to recover, as damages, the value of the lots conveyed. It was held that such action was based upon the contract, which was illegal and void as against public policy, and, the parties being in equal fault, the action could not be maintained.

From the facts stated in the complaint before us, the parties, in making and carrying out the contract, which seems to have been fully executed by plaintiffs, and performed by defendant for over four years, were equally at fault. Therefore the maxim that, "as between those in equal fault, the possessor's case is the better," applies in all its force. (See *Setter v. Elvey*, 15 Kan. 157; *Bagg v. Jerome*, 7 Mich. 145; *Knowlton v. Congress & Empire Spring Co.*, 57 N. Y. 518; *Myers v. Meinrath*, 101 Mass. 366, 3 Am. Rep. 368; *Spalding v. Bank*, 12 Ohio, 544; *Tyler v. Smith*, 18 B. Mon. 793; *Hill v. Freeman*, 73 Ala. 200, 49 Am. Rep. 48.)

The general rule is thus stated by Lawson in 9 Cyclopaedia of Law and Procedure, commencing on page 546: "No principle of law is better settled than that a party to an illegal contract cannot come into a court of law and ask to have his illegal objects carried out, nor can he set up a case in which he must necessarily disclose an illegal purpose as the groundwork of his claim. The rule is expressed in the maxims, '*Ex dolo malo non oritur actio*,' and, '*In pari delicto potior est conditio defendentis*.' The law, in short, will not aid either party to an illegal agreement. It leaves the parties where it finds them. Therefore neither a court of law nor a court of equity will aid the one in enforcing it, or give damages for a breach of it, or set it aside at the suit of the other, or, when the agreement has been executed in whole or in part by the payment of money or the

transfer of other property, lend its aid to recover it back." It is unnecessary to cite authorities in support of this text. "Their name is legion."

Counsel for plaintiffs says that they, upon a disaffirmance of the illegal contract, may recover the property transferred, as upon an implied promise on the part of the defendant to return or make compensation for it. Whether this position is tenable, we need not decide. It cannot be maintained in this action. The facts stated in the complaint are totally at war with such contention. (*Phoenix Bridge Co. v. Keystone Bridge Co.*, 142 N. Y. 425, 37 N. E. 562.) The position is ingenious, but has no foundation upon the facts alleged. Plaintiffs' house is built upon the sands.

It follows that the judgment should be affirmed.

PER CURIAM.—For the reasons given in the foregoing opinion, the judgment is affirmed.

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MURPHY, APPELLANT, v. LEVENGOOD, RESPONDENT.

(No. 1,915.)

(Submitted June 13, 1904. Decided June 27, 1904.)

*Elections — Contest — Statement—Verification — Affidavit—  
Sufficiency.*

1. Under Code of Civil Procedure, Section 2014, requiring that a person contesting an election shall file a statement setting forth certain facts and the particular grounds of such contest, verified by the affidavit of the contesting party that the matters therein contained are true, an affidavit was sufficient, though the grounds on which the contest was based were alleged on information and belief.
2. Code of Civil Procedure, Sections 2021, 2016, permitting the court to dismiss proceedings contesting an election, if the statement of the cause of contest is insufficient, and declaring that no statement of the grounds of contest will be rejected, nor the proceedings dismissed for want of form, if the grounds are alleged with such certainty as to advise defendant of the

particular cause for which such election is contested, merely require that the contestant shall definitely apprise the contestee of the charges relied on, so that he may be prepared to meet them with appropriate proof.

*Appeal from District Court, Deer Lodge County; Welling Napton, Judge.*

PROCEEDINGS by Felix Murphy against Newton E. Levengood. From a judgment for defendant, plaintiff appeals. Reversed.

*Mr. John R. Boarman*, for Appellant.

*Mr. John J. McHatton, Mr. W. C. Jones, Mr. R. B. Smith, Mr. Joseph J. McCaffery, and Mr. T. O'Leary*, for Respondent.

MR. COMMISSIONER CALLAWAY prepared the following opinion for the court:

This action was brought by the appellant to contest the election of respondent to the office of county assessor of Deer Lodge county, and is a result of the election held in November, 1902. It is brought under the provisions of Sections 2010 to 2025, inclusive, of the Code of Civil Procedure. To the complaint, or statement of contest, the respondent interposed a motion asking that the complaint be stricken from the files, and the contest dismissed, "for the reason that the grounds upon which the contest is based are alleged upon information and belief, and for the reason that the verification to said petition is made upon information and belief, and is not in accordance with the statute in such cases made and provided." The court sustained the motion and entered judgment thereupon in favor of the respondent. From the judgment this appeal is prosecuted.

An inspection of the verification to the complaint discloses that it is in practically the same form as that appended to the complaint in *Lane v. Bailey*, 29 Mont. 548, 75 Pac. 191.

The case of *Kirk v. Rhoads*, 46 Cal. 398, referred to in *Lane v. Bailey*, is applicable to this case upon both of the grounds

urged in the motion, and we therefore quote the following language from it: "The affidavit in this case was in the ordinary form of a verification of a pleading, and averred that the statement was true, except as to matters therein set forth on information and belief, and as to those matters affiant believed it to be true. This was a substantial compliance with the statute. To hold that the contestant must make oath to the absolute verity of every averment of the statement would prevent the contest of an election in almost any conceivable case, and would work a practical abrogation of a beneficial law. From the very nature of the case, many, and frequently most, of the essential facts must come to the knowledge of the contestant through the statements of others; for he cannot be present at the various polling places to observe the conduct of the officers of election. We think the object of the provision was merely to require a verification of the statement, but not to prescribe its form or terms. The object of the law is gained when the affidavit is in the ordinary form of a verification of a pleading."

The Supreme Court of Indiana in *Curry v. Baker*, 31 Ind. 151, said that to construe the language of the statute as is contended by respondent, "and require the affidavit to be founded alone upon the personal observation of the contestor, would involve a practical change in the title of the act, so that it should read, 'An Act to prohibit the contesting of any election.'" (And see McCrary on Elections, Section 433.)

In McCrary on Elections (4th Ed.), Section 431, it is said: "It may be stated as a general rule, recognized by all the courts of this country, that statutes providing for contesting elections are to be liberally construed, to the end that the will of the people in the choice of public officers may not be defeated by any merely formal or technical objections."

It is thus apparent that the objections lodged by the contestee against the complaint are untenable.

We have examined the complaint to ascertain whether the court was correct in sustaining the contestee's motion upon the



ground that the complaint is bad for want of substance.

Section 2021, Code of Civil Procedure, provides that the court may dismiss the proceedings if the statement of the cause or causes of the contest is insufficient. Section 2016, following, provides: "No statement of the grounds of contest will be rejected, nor the proceedings dismissed by any court for want of form, if the grounds of contest are alleged with such certainty as will advise the defendant of the particular proceeding or cause for which such election is contested."

While it is true that the complaint in some particulars is subject to criticism as being indefinite, yet we cannot say that it does not state a cause of action. All that the statute requires is that the contestant shall definitely apprise the contestee of the charges relied upon, so that he may be prepared to meet them with appropriate proof. Except in one or two instances, which are not fatal to the maintenance of the action, we think the contestee is advised with certainty to a common intent of the charges which he is to meet.

We are therefore of the opinion that the judgment should be reversed, and the cause remanded for further proceedings.

PER CURIAM.—For the reasons stated in the foregoing opinion, the judgment is reversed, and the cause remanded.

MR. JUSTICE MILBURN, not having heard the argument, takes no part in this decision.

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STATE EX REL. CHENOWETH, RESPONDENT, v. ACTON,  
APPELLANT.

(No. 2,062.)

(Submitted May 28, 1904. Decided June 27, 1904.)

*County School Superintendents—Vacancies—Tie Vote—Qualifications—Statutes—Validity—Constitution.*

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39	592

1. Where there was a tie vote on an election for school superintendent of a county, such vote did not render the office vacant; the previous incumbent being entitled to hold the same until a superintendent was regularly elected.
2. Political Code, Section 1171, providing that in case of a tie vote for a county officer, except county commissioner, the county commissioners shall appoint some eligible person to fill the office, as in case of other vacancies in such office, in so far as it relates to officers named in Constitution, Article XVI, Section 5, providing that such officers shall hold their offices for two years, and until their successors are elected and qualified, is invalid, as in contravention of such section.
3. Political Code, Section 1744, declaring that no person shall be qualified for the office of county superintendent of schools unless he or she holds a certificate of the highest county grade, and is a citizen of the United States, etc., applies to men and women alike.
4. The office of county superintendent of schools being an office created by the Constitution, it was incompetent for the legislature to prescribe by Political Code, Section 1744, as an additional qualification to those prescribed by the Constitution, that an aspirant to such office should be the holder of a teacher's certificate of the highest county grade.

*Appeal from District Court, Teton County; D. F. Smith, Judge.*

ACTION by the state, on relation of Fannie E. Chenoweth, against Rebecca Acton. From a decree in favor of plaintiff, and from an order denying a new trial, defendant appeals. Affirmed.

*Mr. James W. Freeman*, for Appellant.

*Mr. George H. Stanton*, for Respondent.

MR. COMMISSIONER CALLAWAY prepared the following opinion for the court:

This action was brought by the state of Montana, on the relation of Fannie E. Chenoweth, against Rebecca Acton, to try title to the office of county superintendent of schools for Teton county, the relator claiming that the defendant had intruded into and usurped the office, and asking that she be ousted and excluded therefrom. The defendant answered, denying the material allegations of the complaint; pleaded affirmatively her own right to the office, the relator's lack of right and ineligibility thereto, and prayed that she (the defendant) be decreed entitled thereto.

The relator, Chenoweth, was elected at the general election in the year 1900, and within the time allowed by law qualified and entered upon her office, which she has continued to hold ever since. At the general election held in the year 1902 the defendant, Acton, and one Brown were opposing candidates for the office. Both received an equal number of votes therefor. There being no election, the county commissioners of Teton county appointed the defendant to the office, whereupon she assumed to qualify and discharge the duties thereof. The lower court rendered judgment for relator. Defendant moved for a new trial, which was denied, whereupon she appealed from the judgment and the order denying her a new trial.

The first question presented is, was there a vacancy when the county commissioners made the order appointing the defendant? One of the provisions of Section 5, Article XVI, of the Constitution, is that there shall be elected in each county one county superintendent of schools. It also declares: "Persons elected to the different offices named in this section shall hold their respective offices for the term of two years, and until their successors are elected and qualified. Vacancies in all county, township and precinct offices, except that of county commissioners, shall be filled by appointment by the board of county commissioners, and the appointee shall hold his office until the next general election."

Section 1101 of the Political Code provides that an office becomes vacant on the happening of certain events therein enumerated, neither of which relates to the contingency of a tie vote. In construing a section identical with 1101, *supra*, the court said in *Rosborough v. Boardman*, 67 Cal. 116, 7 Pac. 261: "An office becomes vacant on the happening of any of the events enumerated in Section 996 of the Political Code, among which the event relied on in this case is not mentioned. The enumeration in the Code must be held to be exclusive." Citing *People v. Tilton*, 37 Cal. 621; *Stratton v. Oulton*, 28 Cal. 45, and *People v. Bissell*, 49 Cal. 411.

"The word 'vacancy,' as applied to an office, has no technical meaning. An office is not vacant so long as it is supplied, in the manner provided by the Constitution or law, with an incumbent who is legally qualified to exercise the powers and perform the duties which pertain to it; and, conversely, it is vacant, in the eye of the law, whenever it is unoccupied by a legally qualified incumbent, who has a lawful right to continue therein until the happening of some future event. *Stocking v. State*, 7 Ind. 326; *Collins v. State*, 8 Ind. 344; *Akers v. State*, 8 Ind. 484; *State v. Bemenderfer*, 96 Ind. 374; *Gosman v. State*, *supra* [106 Ind. 203, 6 N. E. 349]; *Buller v. State*, 20 Ind. 169; *People v. Tilton*, 37 Cal. 614; *State v. Lusk*, 18 Mo. 333; *Commonwealth v. Hanley*, 9 Pa. St. 513." (*State v. Harrison*, 113 Ind. 434, 16 N. E. 384, 3 Am. St. Rep. 663.)

In appointing the defendant, the county commissioners assumed to act under the provisions of Section 1171, Political Code, which reads, in part, as follows: "In case of a tie vote for clerk of the district court, county attorney, or for any county officer except county commissioner, and for any township officer, the board of county commissioners must appoint some eligible person, as in case of other vacancies in such offices; and in case of a tie vote for county commissioner, the district judge of the county must appoint an eligible person to fill the office, as in other cases of vacancy." Section 1171 does not in terms declare that a vacancy in office shall occur when there has been no election to the office by reason of a tie vote. Section 1101, as we have seen, defines "vacancies," and is exclusive. But in view of the constitutional provision it would not make any difference if the legislature had provided that a failure of election by reason of a tie vote should cause a vacancy at the expiration of the two years for which the county officers are elected, for, by the terms of the Constitution, they "shall hold their offices for the term of two years, and until their successors are elected and qualified." (Constitution, Article XVI, Section 5.) Under this section, it is clear that the relator in this case was entitled to hold her office for the term of two years, and it is equally

clear that she is entitled to hold it until her successor is elected and qualified. Indeed, it is not only her right, but it is her duty to do so. (*State ex rel. Thayer v. Boyd*, 31 Neb. 682, 48 N. W. 739, 51 N. W. 602; *People v. Hardy*, 8 Utah, 68, 29 Pac. 1118.)

Under the provision of the Constitution which we are considering, the right of a duly elected and qualified officer to hold his office until his successor is elected and qualified is as much a part of his term as are the two years specifically mentioned. (*People v. Green*, 1 Idaho, 235.)

In *Kimberlin v. State*, 130 Ind. 120, 29 N. E. 773, 14 L. R. A. 858, 30 Am. St. Rep. 208, the court said: "The adjudicated cases seem to be harmonious in holding that, where one is lawfully in the possession of an office under a constitutional or statutory provision to the effect that he shall hold until his successor is elected and qualified, his right to hold over continues until a qualified successor has been elected by the same electoral body as that to which such incumbent owes his election, or which by law is entitled to elect a successor. *Gosman v. State*, 106 Ind. 203, 6 N. E. 349; *State v. Lusk*, 18 Mo. 333; *People v. Tilton*, 37 Cal. 614; *Ex parte Lawhorne*, 18 Grat. 85; *Johnson v. Mann*, 77 Va. 265; *State v. Jenkins*, 43 Mo. 261; *State v. Harrison*, 113 Ind. 434, 16 N. E. 384, 3 Am. St. Rep. 663."

All elections by the people shall be by ballot. (Constitution, Article IX, Section 1.)

The policy of the provision that certain elective officers shall hold their offices until their successors are elected and qualified rests upon the theory, that in case the electoral body fails to discharge its functions, it is wiser and more prudent to authorize the incumbent to hold over rather than that a vacancy should occur, to be filled by the appointing power. (*State v. Harrison*, 113 Ind. 434, 16 N. E. 384, 3 Am. St. Rep. 663.)

It is significant that Section 5 of Article XVI, *supra*, provides that an elective officer shall hold until his successor is elected and qualified, while one appointed to fill a vacancy holds

only until the next general election. The Constitution recognizes that vacancies will inevitably occur, and provides how they shall be filled. What are vacancies, within the meaning of the constitutional words, is not clear. It was, of course, not necessary to provide expressly that vacancies may occur through the processes of nature. It was contemplated that vacancies might occur because of misconduct or malfeasance in office. For such causes all officers not liable to impeachment shall be subject to removal in such manner as may be provided by law. (Constitution, Article V, Section 18.) But whatever may or may not be vacancies, it is plain that there was none in the office of county superintendent of schools for Teton county when the county commissioners attempted to appoint the defendant to succeed the relator. (*People v. Lord*, 9 Mich. 227; *Lawrence v. Hanley*, 84 Mich. 399, 47 N. W. 753; *State ex rel. Everding v. Simon*, 20 Ore. 365, 26 Pac. 170; *Eddy v. Kincaid*, 28 Ore. 537, 41 Pac. 156, 655; *State ex rel. Henderson v. Burdick*, 4 Wyo. 272, 33 Pac. 125, 24 L. R. A. 266; *People v. Osborne*, 7 Colo. 605, 4 Pac. 1074; *People v. Whitman*, 10 Cal. 38; *People v. Tilton*, 37 Cal. 614; *People v. Hammond*, 66 Cal. 654, 6 Pac. 741; *People v. Edwards*, 93 Cal. 153, 28 Pac. 831; *State v. Boucher*, 3 N. D. 389, 56 N. W. 142, 21 L. R. A. 539.)

The case of *Adams v. Doyle*, 139 Cal. 678, 73 Pac. 582, is inapplicable to the one at bar.

It may not be amiss to say that the invalidity of Section 1171, Political Code, becomes more apparent when it is analyzed with reference to other constitutional provisions. (See Sections 1, 2, Article VII; Section 9, Article VIII; Section 4, Article XVI.)

We now come to the second point in the case. It is asserted that relator is not eligible to hold the office of county superintendent of schools, because when she was elected she did not possess the qualifications required by the statute, in this: She was the holder of only a second-grade certificate, whereas the statute prescribes that "no person shall be deemed legally qualified for

the office of county superintendent unless he or she holds a certificate of the highest county grade, is a citizen of the United States, has resided one year next preceding the election in this state, and one year in the county in which he is a candidate, and has had twelve months' successful experience in teaching in the public schools of this state. \* \* \* " (Political Code, Section 1744.) This section applies to men and women alike, and this fact must be borne in mind.

Section 2, Article IX, of the Constitution, declares that "every male person of the age of twenty-one years or over, possessing the following qualifications, shall be entitled to vote at all general elections and for all officers that now are or hereafter may be elective by the people and upon all questions which may be submitted to the vote of the people: First, he shall be a citizen of the United States; second, he shall have resided in this state one year immediately preceding the election at which he offers to vote, and in the town, county or precinct such time as may be prescribed by law." Section 10 of Article IX declares: "Women shall be eligible to hold the office of county superintendent of schools or any school district office, and shall have the right to vote at any school district election." Section 11 of Article IX declares: "Any person qualified to vote at general elections and for state officers in this state, shall be eligible to any office therein except as otherwise provided in this Constitution, and subject to such additional qualification as may be prescribed by the legislative assembly for city offices and offices hereafter created."

An examination of the Constitution discloses that it prescribes no other qualifications for a county superintendent of schools than those provided for in Sections 10 and 11; that is, the person must be either a woman, or a "person qualified to vote at general elections and for state officers in this state." Additional qualifications are prescribed by the Constitution for certain other officers. The latter part of Section 11 cannot apply, because the office of county superintendent of schools is a

creation of the Constitution. The Constitution has spoken, and it has prescribed the qualifications required of a county superintendent. The legislature may not supplement the constitutional pronouncement upon this subject. The maxim "*expressio unius est exclusio alterius*" applies.

It is earnestly argued that a person who holds the office of county superintendent should be one of learning and experience—one possessing especial professional attainments; that the statute is salutary and in accordance with the best interests of the public schools. All this is doubtless true, but this argument should be addressed to the legislature, which has the power to submit constitutional amendments to the people, and not to a court. If there be unwisdom in the law, the courts have not the power to correct it. They must declare the law as they find it. The people have reserved to themselves the right to select their county superintendents from women and the general body of voters. If they desire to change the fundamental law, the way is open to them to do so conformably to their will.

It follows that the judgment and order should be affirmed.

PER CURIAM.—For the reasons stated in the foregoing opinion, the judgment and order are affirmed.

MR. JUSTICE MILBURN: I concur. If it were not for the fact that the defendant interposed a counterclaim demanding ouster of the plaintiff, and if the court had not adjudicated the defendant's claim to the office upon her said counterclaim, I would not concur, but would hold that the action should have been dismissed for the reason that the record, outside of the complaint of plaintiff, clearly shows that plaintiff never was interfered with by the defendant in the performance of her (the plaintiff's) duties as superintendent of schools. She swears in her testimony, "I was not interfered with by Miss Acton in the conduct of my office at all." Her cause of action, if she have any, is as it appears from the evidence, against the commission-



ers and the treasurer, who, it is alleged, refused to recognize the plaintiff or pay her.

MR. JUSTICE HOLLOWAY, not having heard the argument, takes no part in this decision.

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LUTEY ET AL., APPELLANTS, v. CLARK ET AL.,  
RESPONDENTS.

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331 56

(No. 1,917.)

(Submitted June 14, 1904. Decided June 28, 1904.)

*Corporations—Receivers — Appointment—Sales—Vacation—  
Reversal of Orders—Effect—Involuntary Trusts—Election  
—Application of Property.*

1. Where the receiver of a corporation sold certain of its property, and thereafter the order appointing the receiver and authorizing a sale was reversed on appeal, the purchasers held the property and the proceeds of their sale thereof as involuntary trustees for the corporation, and the receiver held the purchase price as an involuntary trustee for the purchasers, under Civil Code, Sections 2958, 2959.
2. Where orders appointing a receiver and directing a sale of property are reversed on appeal, the purchaser of the property, at a sale had pending the appeal, can recover purchase money paid although the purchased property in his possession has been subjected to the payment of the debts of the corporation for which the receiver was appointed.
3. Where a corporation prosecuted an appeal from orders appointing a receiver and authorizing the sale of certain of its property on which such orders were reversed, such appeal constituted an election by the corporation to have the property restored to it or applied to its benefit, and the application of such property to judgments recovered against the corporation constituted an application of the property to the corporation's benefit.

*Appeal from District Court, Silver Bow County; William Clancy, Judge.*

ACTION by William Lutey and another against W. A. Clark and another. From a judgment in favor of defendants, plaintiffs appeal. Reversed.

*Mr. A. J. Campbell*, for Appellants.

In this case the defendants had no lien upon the money, for two reasons, first, for the reason that the Thornton-Thomas Mercantile Company had no interest in the fund; second, the defendants could not create a lien by causing a writ of attachment to be issued and notice of garnishment served upon themselves. (Wade on Attachment, Vol. 2, Sec. 429; *Knight v. Clyde*, 12 R. I. 119; *Rice v. Sharpleigh Hardware Co.*, 85 Fed. 559; *Belknap v. Gibbons*, 13 Met. 471; *Blaisdell v. Ladd*, 14 N. H. 129; *Hoag v. Hoag*, 55 N. H. 172.)

It was contended in the court below that E. H. Hubbard was an involuntary trustee for the Thornton-Thomas Mercantile Company. (Sections 2953, 2958, 2959, Civil Code of Montana.) In consequence thereof, E. H. Hubbard, having received the money under a mistake of law, became an involuntary trustee for Lutey Brothers for the money so received, or for such part thereof as he received from them for the use and benefit of the plaintiffs in this action. He is likewise a trustee for the money received from other persons, and he or his assignee has a right to receive the same from the person with whom he deposited it, that he may comply with the terms of the involuntary trust thereby created. This relation is created between the parties by the force of the Codes and should be denominated as a constructive trust. (Pomeroy, Equity Jurisprudence, Vol. 2, p. 1047.)

*Mr. W. M. Bickford*, *Mr. Jesse B. Roote*, *Mr. J. L. Templeman*, *Mr. W. A. Clark, Jr.*, and *Mr. George F. Shelton*, for Respondents.

The receiver, Hubbard, appointed by Judge Clancy, whose appointment was subsequently avoided *ab initio* by this honorable court, became and was liable to the Thornton-Thomas Mercantile Company as for a conversion for selling the goods and merchandise of the said corporation in his pretended capacity as receiver, even though he acted in good faith and under a firm belief in the validity of his appointment. (Bigelow on Torts,

p. 238; High on Receivers, Sec. 277; *Gutsch v. McIlhargey*, (Mich.) 37 N. W. 303; *Kenney v. Ranney*, (Mich.) 55 N. W. 982; *Staples v. May*, 87 Cal. 178; *Curran v. Craig*, 22 Fed. 101; *State v. Clancy*, 20 Mont. 284; *Hammock v. Loan & Trust Co.*, 105 U. S. 77; *Thurber v. Miller*, (S. D.) 75 N. W. 900.)

The Lutey Brothers having purchased property belonging to the Thornton-Thomas Mercantile Company from the pretended receiver, Hubbard, were equally with him guilty of a conversion of the goods, and liable for such conversion to the Thornton-Thomas Mercantile Company. It is evident that if a wrongful sale is followed up by delivery, both the seller and buyer are equally guilty of conversion. This is a fundamental principle, and is fully sustained by the authorities both in this country and in England. (*McCombey v. Davis*, 6 East. 538; *Baldwin v. Cole*, 6 Mod. 212; *Hardman v. Booth*, 1 H. & C. 803; *Hollins v. Fowler*, L. R. 7, H. L. 757; *Carter v. Kingman*, 103 Mass. 517; *Omaha & Grant, etc. Co. v. Tabor*, (Colo.) 16 Am. St. Rep. 185; *Gilmore v. Newton*, (Mass.) 95 Am. Dec. 749; *Ford v. Wells*, (Ind.) 43 N. E. 155; *Lodson v. Mostowitz*, (S. C.) 23 S. E. 49; *Clark v. Wells*, 45 Vt. 4; *Clark v. Dideout*, 39 N. H. 238; *Stanley v. Gaylord*, (Mass.) 48 Am. Dec. 643; *Williams v. Merle*, (N. Y.) 11 Wend. 80; *Riford v. Montgomery*, 7 Vt. 418; *Courtis v. Cane*, (Vt.) 76 Am. Dec. 174; *Spooner v. Holmes*, 102 Mass. 507; *Velzain v. Lewis*, (Ore.) 16 Pac. 631, s. c., 3 Am. St. Rep. 184, and cases cited; *Hills v. Snell*, (Mass.) 6 Am. Rep. 216; *Riley v. Boston, etc. Co.*, (Mass.) 11 Cush. 11; *McDaniels v. Adams*, (Tenn.) 11 S. W. 939; *Ramsby v. Beezley*, 11 Ore. 49; *Heberling v. Jagger*, (Minn.) 28 Am. St. Rep. 331; *Case v. Hart*, (Ohio) 38 Am. Dec. 735.)

The Lutey Brothers, having exercised acts of dominion over the goods and merchandise bought from the pretended receiver, Hubbard, were estopped from claiming that they were not the owners of the residue of said merchandise, and from restoring the said merchandise to the Thornton-Thomas Mercantile Com-

pany. (*Bolling v. Kirby*, 24 Am. St. Rep. 808; *Higgins v. Whitney*, (N. Y.) 24 Wend. 379; *Wooley v. Carter*, 7 N. J. Law, 85; *Livermore v. Northrup*, 44 N. Y. 107; *Hart v. Skinner*, (Vt.) 42 Am. Dec. 500; *Whitker v. Houghton*, 86 Pa. St. 48; *Reynolds v. Shuler*, (N. Y.) 5 Cow. 323; *Walker v. Fuller*, 29 Ark. 448; *Hammer v. Wilsey*, (N. Y.) 17 Wend. 91; *Stickney v. Allen*, (Mass.) 10 Gray, 352; *Noman v. Rogers*, 29 Ark. 365.)

Hubbard, the pretended receiver, upon the avoidance of his authority by this supreme court, became an involuntary trustee for the benefit of the Thornton-Thomas Mercantile Company of: (a) All the goods, wares and merchandise in his hands formerly belonging to the Thornton-Thomas Mercantile Company, or (b) Of all the proceeds of the sale of the goods converted to the Lutey Brothers and deposited by him as receiver in the banking house of W. A. Clark & Brother. (Civil Code of Montana, Secs. 2952, 2959; *Pennell v. Deffell*, 4 De. G. M. & G. 372; *Frith v. Cortland*, 2 Hem. & M. 417-420; *In re West of England, etc.*, 11 Ch. D. 772; *Peak v. Elliott*, (Kan.) 46 Am. Rep. 90; *Nat'l Bank v. Ins. Co.*, 104 U. S. 54; *Fox v. Mackreth*, 1 Smith's Leading Cases in Equity, (4th Ed.) p. 115; *Lench v. Lench*, 10 Vesey, 511; *Lewis v. Maddocks*, 17 Vesey, 48-51; *Ernest v. Craysdill*, 2 De Gex, 174; *Springfield, etc. Co. v. Copeland*, (Mass.) 3 Am. St. Rep. 489; *Farmers, etc. Bank v. King*, (Pa.) 98 Am. Dec. 215; *Van Allen v. Bank*, 52 N. Y. 1; *Dows v. Kidder*, 84 N. Y. 121; *Wells, Fargo & Co. v. Robinson*, 13 Cal. 134; *Lathrop v. Bampton*, 31 Cal. 17; *Schlaefler v. Carson*, (N. Y.) 52 Barb. 510; *Olwen v. Pratt*, 3 How. 333; *May v. Le Claire*, 11 Wall. 236; *Hubbard v. Burrell*, 41 Wis. 365; *Murray v. Lylburn*, 2 Johns. Ch. 441; *Briet v. Yeaton*, 101 Ill. 271; *Houghwont v. Murphy*, 2 N. J. Eq. 531; *Newton v. Porter*, 69 N. Y. 133-140; *Bank of America v. Pollock*, 4 Edw. Ch. 215; *Cookson v. Richardson*, 69 Ill. 137; *In re Green's Estate*, 20 N. Y. Supp. 94; *Moses v. Murgatrowd*, 1 Johns. Ch. 119; *Cook v. Tullis*, 18 Wall. 341; *Lathrop v. Bampton*, 31 Cal. 17; *First Nat'l Bank v. Hummell*, (Colo.)

20 Am. St. Rep. 257; *McLoyd v. Evans*, 66 Wis. 401; *People v. City Bank of Rochester*, 96 N. Y. 32; *Gilman v. Hamilton*, 16 Ill. 225; *Attorney General v. College*, 85 Ill. 516; *Chesterfield County v. Dehon*, (Mass.) 16 Am. Dec. 367; *Bank v. Stillwater, etc. Co.*, (Minn.) 30 N. W. 440; *Coggswell v. Griffith*, (Neb.) 36 N. W. 538; *Englar v. Offcut*, (Md.) 14 Am. St. Rep. 332; *Pomeroy's Equity Juris. Secs. 1048, 1051.*)

At the time of the assignment by the pretended receiver, Hubbard, of all his right, title and interest in and to the moneys deposited by him with the banking house of W. A. Clark & Brother, to the Lutey Brothers, the said moneys were subject to the lien of attachment issued on the application of W. A. Clark & Brother in an action commenced by them against the Thornton-Thomas Mercantile Company, and they, the Lutey Brothers, acquired no greater interest or title thereto than Hubbard himself had. That by said attachment and garnishment of said money deposited by the pretended receiver, Hubbard, as receiver, in the banking house of W. A. Clark & Brother the defendants secured a lien thereon, and having subsequently secured a judgment against the Thornton-Thomas Mercantile Company, the said lien became merged in the lien of the judgment and consummated the title of the defendants to the said money—at least, as against the pretended receiver, Hubbard, and his assigns, the appellants herein. (*Davies v. Austin*, 1 Vesey, 245; *Priddy v. Rose*, 3 Meriv. 107; *Turton v. Benson*, 2 Vern. 765; *Cole v. Jones*, 2 Vern. 691; *Murray v. Balou*, 1 Johns. Ch. 566; *Newton v. Boulter*, (N. J.) 25 Am. Rep. 157; *Bullard v. Kinney*, 10 Cal. 60; *Down v. Olmstead*, 41 Ill. 344; *Padfield v. Green*, 85 Ill. 529; *Solomon v. Buschnell*, (Ore.) 50 Am. Rep. 475.)

We submit that the respondents have an absolute right, at least as against the appellants, to the moneys involved in the present case. They have not been negligent in the matter of subjecting the fund according to law to the payment of the judgment obtained by them against the Thornton-Thomas Mercan-

tile Company. They have not slept on their rights; and, further than this, having corporal possession of the funds, they are entitled to the same as against the world until a better title in another person is shown. The general rule is—especially in those states where different courts exercise legal and equitable jurisdiction respectively—that where the trust is an active one, or where the trustee has some discretionary powers to exercise, trust funds in the hands of such trustee cannot be reached by garnishment. (*Lackett v. Roumbaugh*, 45 Fed. 23; *Hinkley v. Williams*, (Mass.) 1 Cush. 490; *Lackland v. Garische*, 56 Mo. 267; *Fauce v. Brown*, 32 N. J. Eq. 118; *Husted v. Stone*, 69 Vt. 149; *Marvel v. Babbet*, 143 Mass. 226; *Prentis v. Pleasanton*, (Pa.) 8 Atl. 842; *Steib v. Whitehead*, 111 Ill. 247.)

Yet, when the trust is a dry or terminated one, such as in the case at bar,—such a one, in fact, that the *cestui que trust* may maintain an action for money had and received against the trustee for money due and payable to him,—this claim, it is well settled, may be reached by garnishment. (Shinn on Attachment and Garnishment, Sec. 531; *Eastbrook v. Earl*, 97 Mass. 302; *Haskell v. Haskell*, 49 Mass. 545; *Davis v. Davis*, 30 Vt. 440; *McLaughlin v. Swan*, (N. Y.) 18 How. 217; *Wilter v. Little*, 66 Iowa, 227; *Elser v. Rommel*, (Mich.) 56 N. W. 1107; Wappels on Attach. and Garnish., 265.)

Any sum payable to the *cestui que trust* can be reached by garnishment proceedings when in the hands of a trustee. (*Girard, etc. Co. v. Chambers*, (Pa.) 86 Am. Dec. 513; *Baker v. Kaiser*, 75 Md. 332, s. c., 23 N. W. 735; *Chandler v. Booth*, 11 Cal. 342.)

Can a creditor garnishee himself and thereby create a lien upon moneys owing to a debtor? (*Rice v. Sharpleigh Hardware Co.*, 85 Fed. 559; *Belknap v. Gibbons*, 13 Met. 471; *Knight v. Clyde*, 12 R. I. 119; *Graighle v. Notnagle*, 1 Pet. C. C. 245, Fed. Cases No. 5,679; *Richardson v. Gurney*, 9 La. 285; *Grayson v. Veeche*, (La.) 13 Am. Dec. 384; *Norton v. Norton*, (Ohio) 3 N. E. 348; *Coble v. Nonemaker*, 78 Pa. St.

501; *Boyd v. Bayless*, (Tenn.) 4 Humphrey's, 386; *Albert v. Albert*, (Md.) 28 Atl. 388; *Lyman v. Wood*, 42 Vt. 113; *New England Screw Co. v. Bliven*, 3 Blatchf. 240, Fed. Case No. 10,156; Sergeant on Attachment, 72; Drake on Attachment, Sec. 543; Wade on Attachment, Sec. 341; *Coke v. Brainforth*, Cro. Eliz. 830; *Paramore v. Payne*, Cro. Eliz. 598; *Morris v. Ludlam*, 2 H. Bl. 362; English cases cited in *Graighle v. Notnagle*, *supra*; Sec. 900 of the Code of Civil Procedure of Montana; *Kipp v. Silverman*, 25 Mont. 305.)

MR. JUSTICE HOLLOWAY delivered the opinion of the court.

On October 7, 1897, J. D. Thomas and George P. Bretherton, minority stockholders in the Thornton-Thomas Mercantile Company, a corporation doing business at Butte, Montana, brought an action in the district court against that corporation for the purpose of having a receiver appointed to take charge of and wind up the business of the concern. The district court appointed one E. H. Hubbard as such receiver, who immediately took possession of the property, and upon the receiver's petition the district court on October 19th made an order for the receiver to sell at once at public auction or private sale the personal property belonging to the corporation. It appears that pursuant to such order the receiver sold to Lutey Bros., appellants here, a portion of such personal property for the sum of \$3,241.19, which sum was paid over to the receiver, and by him deposited in the bank of W. A. Clark & Bro., the respondents, in the name of E. H. Hubbard, receiver; that thereafter on October 21, 1897, the Thornton-Thomas Mercantile Company applied to this court for a writ of *certiorari* to review the action of the district court in appointing the receiver and in making the order of sale above mentioned; that the cause was heard in this court, and on November 15, 1897, this court rendered its judgment and decision reversing the order of the district court appointing the receiver, and vacating all orders of that court

made subsequently thereto, including the order of sale above mentioned (*State ex rel. Thornton-Thomas Mercantile Co. v. District Court, and Clancy, Judge*, 20 Mont. 284, 50 Pac. 852); that on the 15th day of November, 1897, these respondents commenced an action in the district court against the Thornton-Thomas Mercantile Company to recover from said company the sum of \$5,653.96, then due and owing to respondents from such company, and caused a writ of attachment to be issued and placed in the hands of the sheriff of Silver Bow county, who thereupon served notice of garnishment upon these respondents through Alex. J. Johnston, the cashier of the banking house of W. A. Clark & Bro., and thereby attached said sum of \$3,241.19, together with other moneys deposited in the name of E. H. Hubbard, receiver, all aggregating the sum of \$3,949.78; that while Lutey Bros. were in possession of said personal property they sold and disposed of a portion thereof of the value of \$415.85; that thereafter, on the 16th day of November, 1897, various other creditors of the Thornton-Thomas Mercantile Company brought actions in the district court against said company, and caused writs of attachment to issue therein, and caused said personal property remaining in the possession of Lutey Bros. to be attached, and the sheriff took possession of said property under and by virtue of said writs of attachment, and thereafter, upon judgments duly made and entered, sold such property so attached to satisfy the judgments thus obtained against the Thornton-Thomas Mercantile Company; that on March 1, 1898, E. H. Hubbard made demand upon W. A. Clark & Bro. for the moneys so deposited in said bank, but such demand was then and thereafter continuously refused; that on the 25th of May, 1898, the said Hubbard sold and assigned all interest that he had in said money so deposited to Lutey Bros., appellants herein; and thereafter, on May 26, 1898, Lutey Bros. commenced this action in the district court against W. A. Clark & Bro. to recover the said sum of \$3,949.78, with interest and costs. The defendants answered, and thereafter the parties agreed upon the facts of the case, and an agreed statement was



filed February 13, 1901, containing the facts heretofore recited, and upon such statement of facts the district court found the issues for the defendants W. A. Clark & Bro., and entered judgment in their favor for their costs. From this judgment this appeal is prosecuted.

This court having determined in the *certiorari* proceedings that the action of the district court in appointing the receiver was without jurisdiction, and having reversed that order and annulled all orders made subsequently thereto, particularly the order under which the receiver pretended to sell certain personal property to Lutey Bros., these appellants, it becomes a question for determination then whose money was it that was attached in the hands of W. A. Clark & Bro., deposited there by Hubbard, the receiver, and whose goods were they that were attached in the hands of Lutey Bros. at the suits of other creditors of the Thornton-Thomas Mercantile Company?

It is said that, as Hubbard and Lutey Bros. exercised acts of dominion over these goods without the consent of the mercantile company, and in opposition to its interests, each is liable in conversion; that after the decision of this court Hubbard became an involuntary trustee for that company, and, as the company then could have pursued their goods or the particular funds derived from their sale, respondents W. A. Clark & Bro. could do likewise.

Much discussion is indulged in by counsel for respondents which is not pertinent here. Assuming that the pretended sale by Hubbard to Lutey Bros. was wrongful, and constituted a conversion of the goods, and that Lutey Bros., by their acts of ownership over the goods in selling a portion of them, were likewise guilty of a conversion, it must be conceded that the mercantile company, while it could maintain an action against Hubbard for conversion, or could pursue Lutey Bros. and elect either to sue them as for a conversion of the property or in claim and delivery for the return of the specific property or such portion of it as remained in their possession, it cannot maintain an

action in conversion against Hubbard and a like action against Lutey Bros., and thereby enforce two judgments for the same cause of action, or it cannot pursue Hubbard in conversion and sue Lutey Bros. for the specific property at the same time. The company was entitled to the property or to its value, but not to both. The effect of the decision of this court in vacating the order of sale was to declare such sale void *ab initio*; that in fact no sale had ever been made, and that the mercantile company was still the owner of the goods of which Lutey Bros. had come into possession; and whatever right the mercantile company had to make an election to take the property or sue for damages for its conversion, until it exercised such election, the ownership of the property was in it, and such property was subject to attachment at the instance of any of its creditors. The decision of this court was to the effect that no sale had been made; in other words, that the pretended sale was without effect, and conveyed no title to the property. Hubbard, having received the money belonging to Lutey Bros. on such void sale, became (on such sale being declared void) an involuntary trustee of Lutey Bros. for the amount of money received from them; and likewise Lutey Bros., having received such goods on such pretended sale, became an involuntary trustee for the mercantile company for the goods which they retained and for the money which they had received from a sale of the portion of the goods disposed of by them.

Sections 2958 and 2959 of the Civil Code provide: Section 2958: "One who wrongfully detains a thing is an involuntary trustee thereof, for the benefit of the owner." Section 2959: "One who gains a thing by fraud, accident, mistake, undue influence, the violation of a trust, or other wrongful act is, unless he has some other or better right thereto, an involuntary trustee of the thing gained, for the benefit of the person who would otherwise have had it." Section 4334 of the Civil Code is cited, and it is said that the presumption of the measure of damages arising from the wrongful conversion of personal property cannot be repelled in favor of one whose possession is wrongful

from the beginning by his subsequent application of the property to the benefit of the owner without the owner's consent. But this section has no application here, for the record discloses that the mercantile company did elect to have the sale set aside, to have its property restored to it or applied to its benefit, and when it was applied to the satisfaction of judgments recovered against the mercantile company it was applied to the company's benefit. The proceedings in this court were taken at their instance, and constituted such election.

We are of the opinion that this disposes of the case, and it is not necessary to decide the abstract question, can a plaintiff in an attachment suit secure a lien upon property in his own possession by having himself served as garnishee?

As it does not appear from this record what disposition was ever made by appellants of the \$415.85 received by them from the sale of a portion of the goods belonging to the mercantile company, this court is unable to make any order respecting the same.

The judgment is reversed, and the cause remanded to the district court, with directions to enter judgment in favor of the plaintiffs (appellants here) for \$3,241.19, together with interest and costs.

*Reversed and remanded.*

MR. JUSTICE MILBURN, not having heard the argument, takes no part in this decision.

### ON MOTION FOR REHEARING.

(Decided October 3, 1904.)

MR. JUSTICE HOLLOWAY delivered the opinion of the court.

Respondents have petitioned for a rehearing and a modification of the order heretofore made by this court in determining

this appeal. Respondents pray that this cause be remanded for a new trial.

In the opinion heretofore rendered (*Lutey v. Clark*, 31 Mont. 45, 77 Pac. 305) this language is used: "As it does not appear "from this record what disposition was ever made by appellants "of the \$415.85 received by them from the sale of a portion of "the goods belonging to the mercantile company, this court is "unable to make any order respecting the same." Respondents now contend as this court was unable to make any suggestion as to the proper disposition of this \$415.85, a new trial should be ordered, that a determination respecting that sum of money may be had. The language quoted above from the former opinion of this court was inaptly used. That sum of money was received by Lutey Bros. from a sale of a portion of the stock of goods which they had received under the pretended sale of the receiver. That sale being void, the remaining portion of those goods and this sum of money were held by Lutey Bros. as an involuntary trustee for the Thornton-Thomas Mercantile Company. This company is not a party to this action and their interests could not be affected by any new trial which may be ordered; in fact, there is nothing to try respecting this sum of money as between the parties to this action so far as this record shows.

But it is contended that W. A. Clark & Bro. are subrogated to the rights of the Thornton-Thomas Mercantile Company, and therefore this sum should be deducted from the amount which Lutey Bros. are entitled to recover from them. But this subrogation arises, if at all, from the mere fact that W. A. Clark & Bro. secured a judgment against the Thornton-Thomas Mercantile Company, which judgment has never been satisfied. Respondents' contention then is this: If A. sue B. and attaches certain property, and B. has other property which is not attached or levied upon in any manner, and A. recovers a judgment which is not satisfied, he thereupon becomes subrogated to the right of B. in the property which was not seized. The

mere statement of the proposition is sufficient demonstration of its absurdity. It is nowhere claimed that Clark & Bro. ever levied upon or seized this sum of \$415.85 in the hands of Lutey Bros. or in any manner brought themselves into privity with it. As they have no interest in it now, so far as this record discloses, they cannot be heard to ask for any adjudication in this action respecting it. In our former opinion we should either have made no reference whatever to this sum, or should have contented ourselves with merely remarking that, as this sum belongs to the Thornton-Thomas Mercantile Company, a concern not a party to this present action, we are without authority to make any direction as to the proper disposition of it.

The motion for rehearing is denied.

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HANDLEY, RESPONDENT, v. SPRINKLE, APPELLANT.

(No. 1,892.)

(Submitted April 28, 1904. Decided June 28, 1904.)

*Written Instruments—Cancellation — Bill—Actions—Consolidation—Effect — Statutes—Costs — Judgments—Appeal—Bill of Exceptions — Evidence — Certification—Review of Evidence.*

1. Under Code of Civil Procedure, Section 1894, actions consolidated are merged into one suit, and hence only a single judgment should be rendered settling the entire controversy.
2. Where actions are consolidated as authorized by Code of Civil Procedure, Section 1894, the court should require the pleadings to be reconstructed as in one suit.
3. Where actions are consolidated as authorized by Code of Civil Procedure, Section 1894, the court should determine what costs, if any, should be charged to either party in the original suits, costs subsequently accruing being taxable only in the consolidated action.
4. The legality of the consolidation of actions will not be reviewed by the supreme court unless excepted to at the time and brought to the supreme court by the party excepting.
5. Where a bill to set aside a note, secured by a chattel mortgage, on the ground of fraud, alleged facts showing a mere failure of consideration for the note, and did not allege either that defendant was insolvent, that plaintiff did not have an adequate remedy at law, or that defendant had

threatened to dispose of the note before maturity to a *bona fide* purchaser, but alleged that defendant was in possession thereof and refused to deliver the same to plaintiff, it was insufficient.

6. Under a statute providing that in the settlement of statements and bills of exceptions the court shall eliminate all immaterial evidence, if a bill of exceptions or statement appears to contain all material evidence, or the substance thereof, given on the trial of the case, referring to the points brought before the supreme court for review, that court has full power to consider the sufficiency of the evidence, if properly specified as a ground of error.

*Appeal from District Court, Choteau County; John W. Tattan, Judge.*

CONSOLIDATED actions by Charles W. Handley against Robert L. Sprinkle. From judgments in favor of plaintiff, and from an order overruling a motion for a new trial, defendant appeals. Reversed.

*Messrs. Downing & Stephenson, and Mr. W. S. Towner, for Appellant.*

As consolidation merges the several actions into one, and they thenceforth constitute but a single action, but one judgment must be rendered, and the more so if they are heard together, decided and are in one transcript. (4 Am. and Eng. Ency. Pleading and Practice, p. 705; *Capron v. Adams Co.*, 43 Wis. 614; *Mills v. Paul*, 30 S. W. 395; *Mills v. Paul*, 30 S. W. 559; *Hiscox v. Staats Zeitung*, 23 N. Y. S. 683; *Blake v. R. R. Co.*, 17 Howard Pr. 228.)

*Mr. Charles N. Pray, and Mr. George H. Stanton, for Respondent.*

There are but two judgments in the two actions. It was the duty of the clerk to enter one of these judgments, and it was the duty of the court to enter the other. The fact that several suits are consolidated does not change the rules of pleading, nor the rights of the parties. The rights must still turn upon the pleadings, proof and proceedings in the respective causes. (4 Ency. Pl. and Pr. 691; *Mowry v. Davenport*, 6 Lea. (Tenn.)

82; *Brevard v. Summar*, 2 Heisk. (Tenn.) 105; *Lofland v. Coward*, 12 Heisk. (Tenn.) 546.)

The mode of consolidation at law is not by uniting the several actions in one entire record. (*Burnham v. Dalling*, 16 N. J. Eq. 310.)

In equity an order of consolidation has no other effect than to hear the cases thus consolidated at the same time. The issues remain precisely on the pleadings as they were before, and between the same parties, and are to be determined exactly as if the cases were heard separately. (4 Ency. Pl. and Pr. 695.)

We think the correct practice in the case of consolidations of actions is to make a separate motion for new trial in each case upon the grounds peculiar to that case alone, and then prepare separate bills of exceptions and present separate appeals, and let each case stand on its own record. The purpose of the consolidation is simply that of trial in the court below. (*Harmon v. San Francisco & San Raphael R. R. Co.*, 86 Cal. 617.)

Counsel complain of separate judgments for costs being entered. In consolidating several actions, the taxing of the costs is to be determined in the exercise of a sound judicial discretion. This is the rule, both at common law and by statute. (4 Ency. Pl. and Pr. 699.)

Where cases are consolidated for trial, the causes of action remain distinct to the extent of requiring separate verdicts. (4 Ency. Pl. and Pr. 703.)

In the case of *Land Commissioners v. Reily*, Dall. (Tex.) 381 (referred to in above citation), it is said: "The rendering of one general judgment on a number of separate actions is an anomaly in the history of judicial proceedings." (*Mutual Life Ins. Co. v. Hillmon*, 145 U. S. 285.)

Where the record shows separate verdicts and judgments, it would seem that for the purposes of an appeal they must be treated as separate and distinct trials. (*Mills et al. v. Paul et al.*, (Tex.) 23 S. W. Rep. 189.)

Where cases are consolidated, upon the rendition of verdicts the order of consolidation is, *ipso facto*, dissolved. (*Mills v. Paul*, 30 S. W. Rep. 242; *Pupke v. Meador*, 72 Ga. 230.)

The fact of separate judgment being entered would be no cause for granting a new trial. All informalities in judgments are capable of being corrected under the direction of the appellate court. (*Duignan v. Montana Club*, 16 Mont. 189.)

MR. COMMISSIONER CLAYBERG prepared the following opinion for the court:

Appeal from judgments against defendant, and an order overruling his motion for a new trial.

On June 17, 1900, respondent (Handley) brought suit against appellant (Sprinkle) upon two causes of action, viz.: (1) An action for damages for the breach of a contract for the care and running of a certain band of sheep. In connection with this cause of action plaintiff alleges that, at the date of the making of the contract alleged, plaintiff and wife executed and delivered to defendant their promissory note for \$1,900, and also executed and delivered a chattel mortgage securing payment of the same, but that the said note and mortgage were solely for the purpose of securing future advances of money to defray the expenses of running the sheep under the alleged contract. (2) An action on account for the value of goods, wares and merchandise sold and delivered to the defendant.

The defendant answered the first cause of action by a general denial of all the allegations of the complaint, and by affirmative allegations setting up the existence of a contract with plaintiff for running a band of sheep from the . . . day of August, 1899, for one year, setting up the terms of the contract, among which was an agreement on his (defendant's) part to furnish all money necessary to pay the expenses of running the sheep during the year, which was to be returned to him on final settlement; that plaintiff took possession of the sheep under this contract in August, 1899; that on June 28, 1900, plaintiff's demands for money became so unreasonable that defendant demanded a settlement of all their accounts, which was then and there had,



and, after giving plaintiff all the compensation to which he was entitled under the contract, plaintiff was found to owe defendant the sum of \$1,900, whereupon plaintiff and his wife gave defendant their promissory note for this amount, secured by a chattel mortgage, a copy of which is attached to the answer. The defendant further alleged that he was the sole holder and owner of the note and mortgage, and that no part had been paid, except the amount specified in his answer to the second cause of action. In his answer to the second cause of action he admits purchasing the articles mentioned in paragraphs 1 and 2, of the plaintiff, at the prices stated; denies all the other allegations of the second cause of action. He then sets forth by way of affirmative matter the same facts as alleged affirmatively in his answer to the first cause of action, with the additional allegation that the sum total value of the merchandise admitted to have been purchased from plaintiff, as stated in his answer, was credited on the note above referred to by the agreement of the parties. To this answer plaintiff replied by way of general denial.

On June 17, 1901, plaintiff instituted another suit against defendant, by which he sought to have the note and chattel mortgage set up in the pleadings in the prior suit canceled, and to have plaintiff enjoined from taking possession of the mortgaged property, and from transferring or disposing of the note. Cancellation was asked for on the ground of fraud on part of the defendant in obtaining the note and mortgage. (Further reference to this complaint will hereinafter be made.) To this complaint defendant answered, admitting that prior to June 28, 1900, the plaintiff was running a band of sheep as lessee, which sheep were owned by defendant as lessor; admits the execution and delivery of the note and mortgage, and that he is in the possession thereof. He then denies "each and every allegation of the complaint not hereinbefore specifically admitted."

When the cases above mentioned came on for trial, the defendant moved the court for a consolidation of the suits, "in accordance with Section 1894, Code of Civil Procedure." This

motion was sustained, over the objection of plaintiff, and the cases were consolidated. The record does not show the order of the court made upon such consolidation. The suits were tried together before a jury, which rendered separate general verdicts in favor of plaintiff in each original suit. In addition to their general verdicts, the jury made six special findings in plaintiff's favor, two of which were applicable to the suit at law, and four to the suit in equity.

On the day after the rendition of these verdicts, the clerk of the court entered judgment in each original suit, in accordance with the general verdicts of the jury. In the suit at law the judgment was for the sum of \$500 (the amount of damages found by the jury for plaintiff), and \$217 costs of suit. In the action in equity the judgment is in the following form: "Wherefore, by virtue of the law, and by reason of the premises aforesaid, it is ordered, adjudged and decreed that the said plaintiff do have and recover from said defendant the sum of . . . . . dollars, with interest thereon at the rate of eight per cent per annum from the date hereof till paid, together with said plaintiff's costs and disbursements incurred in this action, amounting to the sum of nine dollars and fifty cents (\$9.50)."

On the same day the verdicts were rendered plaintiff's counsel moved the court in the equity suit to adopt the findings and verdicts of the jury, and render a decree as prayed for in the complaint. On September 28th defendant's attorney moved the court to reject each of the findings in both cases for certain reasons stated in the motion. On December 11th the court adopted the findings of the jury, and rendered a decree in the equity suit against defendant, as prayed for in the complaint, and entered a judgment against defendant for \$226.50 for costs.

Two important questions are presented for determination upon the record in these appeals, viz.: What is the practice after the consolidation of suits, under Section 1894, *supra*; and was such practice followed?

This section is as follows: "Whenever two or more actions are pending at one time between the same parties and in the

same court, upon causes of action which might have been joined, the court may order the actions to be consolidated." It is apparent that the purpose of this provision is to compel a party having different causes of action against another, which might be joined in one suit, to include such causes of action in one suit, so as not to vex the defendant with several suits and place the burden of extra costs upon him.

The consolidation of actions under this statute must be distinguished from what has been known for many years as the "consolidation rule," which was first devised and established by Lord Mansfield. Under that rule, where many cases were pending between the same parties in which the same issues were involved, one case was tried, and all proceedings in the other cases were stayed until after such trial. It must also be distinguished from the old practice in equity of consolidating equity cases. Under such practice, each case was decided upon its own pleadings and evidence. The consolidation in equity cases under this practice was practically consolidating them for the purpose of trial alone.

In our judgment, the consolidation of actions under our statute merges all the actions consolidated into one suit. There may be many causes of action, but the effect of consolidation is to join them all in one suit. If this is true, there can be but one judgment in the consolidated suit, and this judgment must settle all the issues involved. All the suits consolidated are ended as separate suits, and exist thereafter only as parts, respectively of the consolidated suit. Where an order of consolidation is made, the court should require the pleadings to be reconstructed as in one suit, if necessary, and should determine what costs, if any, should be charged to either party in the original suits. All costs in the consolidated suit accrue only after the consolidation. If the pleadings are ordered reformed, the complaint in the consolidated suit should state all of plaintiff's causes of action against the defendant as alleged in each of the suits consolidated, and the answer of the defendant should

present all issues which he has raised in such suits. The complaint in the consolidated suit should be the same as if the plaintiff had joined all causes of action alleged in the original suits in one action. Of course, on the trial, several findings may be had upon the several causes of action stated in the pleadings; and if legal and equitable actions are consolidated they may be tried in the same manner as though such causes had been joined in the same complaint.

In this case, although the original suits were consolidated in accordance with the statute, and were tried as one, yet separate final judgments were entered in each original suit. In fact, the record discloses the entry of three separate judgments—one in each original suit—entered by the clerk upon the verdicts, and a decree by the court in the equitable suit. It also appears that the clerk entered as costs against defendant in the judgments in the two original suits the sum of \$226.50, and that the court included the same amount as costs in the decree in the equitable suit.

There is a great dearth of decisions upon the points above decided, but we have gathered our conclusion from the examination of all sources at our command.

It is apparent from the record that plaintiff recovered duplicate judgments for the same costs, when he was only entitled to single costs, which should be given in a judgment in the consolidated suit.

We cannot consider upon these appeals the question as to whether or not the consolidation was proper under the statute, for the reason that appellant himself caused the consolidation to be made. The legality of the consolidation of actions will not be reviewed by this court unless excepted to at the time and brought to this court by the party excepting. Appellant could not take such exception, having caused the consolidation to be made, and upon these appeals we cannot consider any exceptions of respondent.

If, aside from the question of costs, the judgments rendered were warranted by the pleadings and proofs, this court would

have the power to order them to be modified as to costs, and, as modified, affirmed; but we are satisfied that the court erred in entering the decree in the equitable suit, and therefore the judgments must be reversed.

Appellant insists that the complaint in the equitable suit does not state facts sufficient to constitute a cause of action, or to entitle respondent to the cancellation of the note and mortgage. If this position is well taken, the court below erred in rendering the decree. The equitable suit, as before stated, was for the primary purpose of having the note and mortgage surrendered for cancellation; injunctions were asked as incidental to this relief.

The cancellation was demanded upon allegations which are, briefly, in substance as follows: That plaintiff was in possession of certain sheep belonging to defendant, under a contract to care for and run the same; that by the terms of this contract the parties thereto were to bear "certain expenses connected with the running of said sheep"; that defendant fraudulently represented to plaintiff that it would be necessary for plaintiff to "execute a chattel mortgage on his property in order that moneys might be procured to defray the expense of running said sheep for the year beginning on said June 28, 1900"; that "by said representations the defendant fraudulently induced the plaintiff to execute a note and chattel mortgage, and the plaintiff, relying upon such fraudulent representations," executed and delivered the note and mortgage in question; that, at the time the note and mortgage were given, plaintiff was not indebted to defendant in any sum; that "it was then and there understood and agreed that the defendant would from time to time advance to the plaintiff the moneys necessary to defray the expenses in running the sheep, to the amount of \$1,900 or over"; that, immediately after the execution of the note and mortgage, defendant violated the contract for running the sheep, and "then and there took possession of all said sheep and removed them," and has kept them ever since, and refused to allow plaintiff to run or care for them or exercise any control over them, "without any

fault of plaintiff, and against his will and consent"; that "there was no consideration whatever for the execution or delivery of the said promissory note or chattel mortgage," and that "the defendant never advanced any sums of money whatever to the plaintiff on account of said promissory note or mortgage."

These are all the allegations of the complaint upon the cause of action for cancellation; all the others have reference to the issuance of injunctions. It is perceived that there is no allegation of the insolvency of the defendant, no allegation that plaintiff did not have an adequate remedy at law, and no allegation that defendant threatened to dispose of the note before maturity to a *bona fide* purchaser, but, on the contrary, the allegation "that the defendant has the possession of said promissory note, and refuses to deliver the same to plaintiff." It is very plain that there is no allegation of any fraudulent act or conduct on the part of defendant sufficient to warrant the court in canceling the note and mortgage. The most that can be said of the allegations is that plaintiff claims and alleges failure of the consideration of the note. The consideration alleged was the advancement of money from time to time under a certain contract, that defendant violated the said contract and refused to carry out the same, and that he did not advance the defendant any money. This is simply an allegation of the making of a contract by the defendant, and the breach thereof, for which the defendant was liable to the plaintiff in damages. The facts alleged in the complaint as above recited would simply furnish the plaintiff a defense to an action on the note by the defendant and for a foreclosure of the mortgage. If the property should have been seized under the chattel mortgage, plaintiff would have had a right, under such facts, to maintain an action of claim and delivery for their possession, or an action in conversion for their value. There having been an adequate remedy at law against the note and mortgage in the hands of defendant, equity cannot intervene for the cancellation of said instruments. The remedy of plaintiff was either an action against the defendant for damages for a breach of his contract, or a defense to any

suit which the defendant might bring on said note and mortgage.

It may be claimed that the note was not yet due, and was negotiable. If the plaintiff had alleged in his complaint that the defendant was about to sell or dispose of the note to a *bona fide* purchaser, which would cut off his defense to the note in a suit by defendant, there might have been some merit in the fact that the note was negotiable and not yet due, but not a solitary allegation tending even to show such facts was made in the complaint.

We are of the opinion that the complaint in the equity action did not state facts sufficient to entitle the plaintiff to the relief demanded, and therefore that the decree entered in said action by the court was erroneous.

As above stated, the consolidated suit was simply one suit, and only one judgment could be entered therein. The fact that the decree in the equity suit was entered erroneously is sufficient to reverse all judgments appealed from and direct a new trial. It therefore becomes unimportant to consider the questions as to whether the statement on motion for a new trial in the suit at law was settled in time, or whether the court erred in refusing the nonsuit to plaintiff's first cause of action in the suit at law, or whether the court erred in overruling the defendant's motion for a new trial in the equity suit, or whether we have a right to consider the sufficiency of the evidence where the record does not disclose that it contains all the evidence. We remark, however, that, under the statute providing for the settlement of statements and bills of exceptions, it is the duty of the court settling the same to cut out all immaterial evidence, so that if the bill of exceptions or statement appears to contain all material evidence, or the substance thereof, given on the trial of the case—referring to the points brought before this court for review—we have full power and authority to consider the insufficiency of the evidence, if properly specified.

We advise that the judgments appealed from be reversed, and the cause remanded with instructions to the district court that

it first determine whether the two original suits can be consolidated under the statute, and, if it is of the opinion that they cannot be consolidated, to set aside the order of consolidation as now made, and require the actions to be tried separately. If the court below is of the opinion that the original suits can be consolidated, we advise that it try the consolidated suits as a single suit—hearing the equitable suit first and then the action at law—and enter a single judgment settling all the controversies involved.

PER CURIAM.—For the reasons stated in the foregoing opinion, the judgments are reversed, and the cause is remanded with instructions to the court below that it first determine whether the two original suits can be consolidated under the statute, and, if it is of the opinion that they cannot be consolidated, to set aside the order of consolidation as now made, and require the actions to be tried separately. If the court below is of the opinion that the original suits can be consolidated, we advise that it try the consolidated suits as a single suit, consisting of various causes of action—hearing the equitable suit first and then the action at law—and enter a single judgment settling all the controversies involved.

MR. CHIEF JUSTICE BRANTLY, not having heard the argument, takes no part in this decision.

Rehearing denied.

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MARTIN APPELLANT, v. HEINZE, RESPONDENT.

(No. 1,916.)

(Submitted June 13, 1904. Decided July 2, 1904.)

*Account Stated—Pleadings—Copy of Account—Right of Adverse Party.*

31 08  
32 235

31 68  
138 84

31 68  
689 519



1. Code of Civil Procedure, Section 743, providing that it is not necessary for a party to set forth in his pleading the items of the account therein alleged, but he must deliver to the adverse party, after demand, a copy of the account, applies to actions on open, unsettled accounts, and not to actions on accounts stated.
2. An "account stated" is an agreement between the parties, either express or implied, that all the items are correct; this agreement is the cause of action, hence, in an action on an account stated, the items of the original account may not be inquired into or surcharged, except upon the ground of fraud, error or mistake in the ascertainment of the balance, and then only when the fraud, error or mistake upon which the agreement is sought to be impeached is specifically alleged in the answer.
3. Under Code of Civil Procedure, Section 743, if the "further account" is not furnished in obedience to the order, the penalty is not a refusal to hear evidence in support of the claim, but punishment as for a contempt.
4. *Semble*: If, in an action upon an account stated, it should become necessary that the defendant have a bill of particulars, or otherwise ascertain the facts, in order that he may prepare his defense, the appropriate remedy would seem to be an application to the court for such a bill, or for an inspection of plaintiff's accounts, under Section 1810 of the Code of Civil Procedure.

*Appeal from District Court, Silver Bow County; E. W. Harney, Judge.*

ACTION by Samuel D. Martin against F. Aug. Heinze. From a judgment for defendant, and from an order denying a new trial, plaintiff appeals. Reversed.

*Messrs. Forbis & Mattison, for Appellant.*

An account stated dispenses with items, and the defendant in an action upon such an account is not entitled to a bill of particulars. (Code of Civil Procedure, Sec. 743; *Conner v. Hutchinson*, 17 Cal. 278; *Providence Tool Co. v. Prader*, 32 Cal. 634, 638; *Estee's Pl. and Forms*, 4th Ed., Vol. 1, p. 425; *Holmes v. Page*, (Oregon) 23 Pac. 961; *Anzerais v. Naglee*, (Cal.) 15 Pac. 371; *Hendy v. March*, (Cal.) 17 Pac. 702; *McCarthy v. Mt. T. L. & W. Co.*, (Cal.) 43 Pac. 956; *McClelland's Executor v. West's Administrator*, 70 Penn. St. last paragraph of decision on p. 187; *Truman v. Owen*, (Ore.) 21 Pac. p. 665; A. and E. Ency. of Law, 2d Ed., p. 456; *Christofferson v. Howe*, (Minn.) 58 N. W. p. 830; *Benites v. Bicknell et al.*, (Utah) 3 Pac. p. 206; 1st A. and E. Ency. of Law, p. 437, and cases cited; 1st A. and R. Ency. of Law, p. 456, and cases cited;

*Samson v. Freeman*, 102 N. Y. 700; *Carpenter v. Kemp*, 101 N. Y. p. 592; *Manchester Paper Co. v. Moore*, 104 N. Y. 681; 54 N. Y. 480-2; 2 Greenleaf on Evidence, 9th Ed., Sec. 127, p. 128; 1 Ency. of Forms, pp. 191-4; *Lockwood v. Thorne*, 62 Am. Dec. p. 81-84; *Kellar v. Kellar*, 18 Neb. 366; *Throop v. Sherwood*, 9 Ill. 92; *Schultz v. Morette*, 146 N. Y. 137; *Porter v. Price*, 80 Fed. 658; *Marye v. Strouse*, 5 Fed. 483, 496; *McIntyre v. Warren*, 3 Keyes, 262; *Chapelaine v. Decheneaux*, 4 Cranch. 306.)

Mr. James M. Denny, for Respondent.

As to what constitutes an account stated, see: *Holmes v. Page*, 23 Pac. 961; *Anzerai v. Naglee*, 15 Pac. 271; *Burk v. Wolfe*, 6 Jones & S. (N. Y.) 263; *Marye v. Strouse*, 5 Fed. 489; *Leather, etc. Bank v. Morgan*, 117 U. S. 96; *Coffee v. Williams*, 37 Pac. 506; 1 Am. and Eng. Ency. of Law, p. 108.)

In providing for the statement or copy, pursuant to Section 743, Code of Civil Procedure, the legislators had in contemplation a bill of particulars such as was known to the courts at the time of the enactment of the Code and to have the same effect and serve the same purpose. Such bill of particulars was uniformly held to be requisite for the protection of the defendant to enable him to know just what he was required to defend against in case he believed that such a statement or such information as could be gained from the itemized statement necessary for a proper preparation and presentation of his defense. (*Johnson v. Mallory*, 2 Robertson, 681; *Barkley v. R. R. Co.*, 27 Hun. 516; *Broom v. Calvert*, 4 Dana, 220; *Smith v. Hicks*, 5 Wend. 51; *People v. Common Pleas*, 4 Wend. 200; *Drake v. Thayer*, 5 Robertson, 694; *Bowman v. Earle*, 3 Duer, 691; *Chyster v. James*, 1 Hill, 214; *Brown v. Williams*, 4 Wend. 360; *Rickman v. Haight*, 15 Johnson, 222; Encyclopedia Law, (Vol. 2) 244; *Sanchez v. Dickenson*, 19 N. Y. Sup. 733; *Duffy v. Ryer*, 17 N. Y. Sup. 843; *Wells v. Vanakin*, 37 Hun. 315; *Sutherland on Contracts*, Sec. 307.)

The form used by defendant is practically that approved of and set forth in Estee's pleadings, 4th Ed., Section 4431.

The language of Section 743 of the Code of Civil Procedure shows it to be peremptory, and that it is peremptory is clearly shown by the decision of the Supreme Court of the State of Colorado in the case of *Scott et al. v. Frost*, 36 Pac. 910, under a statute similar to Section 743, Code of Civil Procedure, Montana.

An account stated is but *prima facie* evidence of the fact of indebtedness. (*Sedwick v. Macy*, 49 N. Y. Supp. 154; *Pick v. Slimmer*, 70 Ill. App. 358; *Porter v. Price*, 80 Fed. 655; *Wiggins v. Burkham*, 10 Wall. 129; *Poppers v. Schonfeld*, 97 Ill. App. 477; *Colo. Fuel, etc. Co. v. Chapelle*, 12 Colo. App. 385; *Abbott's Trial Evidence*, 458.)

MR. CHIEF JUSTICE BRANTLY delivered the opinion of the court.

In this action the plaintiff seeks to recover from the defendant the sum of \$12,665, balance alleged to be due upon an account stated. It is alleged that on September 8, 1900, in Butte City, Montana, an accounting and settlement was had between the plaintiff and the defendant; that then and thereupon an account was stated between them; that upon such statement a balance of \$20,665 was found due to the plaintiff from the defendant; and that the defendant then and there agreed to pay the same to plaintiff. It is further alleged that on the same day the defendant paid to plaintiff the sum of \$8,000, leaving a balance due of \$12,665, no part of which has been paid. Defendant answered by general denial of all the allegations of the complaint.

The action was commenced on February 5, 1901. The answer was filed on June 13th. In the meantime, on March 15th, the defendant served upon plaintiff a written demand, of which the following is a copy: "The defendant in the above-entitled cause hereby demands an itemized account of the items of indebted-

ness which the plaintiff claims against the defendant—said items of account to be distinctly set out separately—and, upon failure to receive the same, defendant will object to the introduction of proof.” The plaintiff having failed to comply with this demand, the defendant on October 3, 1901, after notice to plaintiff, filed with the clerk a motion asking the court for an order requiring the plaintiff to do so. On January 28, 1902, after a hearing upon this motion, the court caused to be entered in the minutes the following: “This day defendant’s motion for itemized account herein is by the court sustained.” On October 23, 1902, the cause came on regularly for trial. A jury was called and sworn. The plaintiff was sworn as a witness, and an objection by the defendant to the introduction of evidence, on the ground that the plaintiff had failed to comply with his demand, and the order of the court to furnish the itemized account, was sustained. The court thereupon directed a verdict for the defendant. Judgment was entered accordingly. The plaintiff has appealed from the judgment, and also from an order made denying him a new trial.

The only question presented arises out of the action of the court in sustaining defendant’s objection. Section 743 of the Code of Civil Procedure reads as follows: “It is not necessary for a party to set forth in a pleading the items of an account therein alleged, but he must deliver to the adverse party, within five days, or such further time as the court may allow, or may be agreed to by the parties, after a demand thereof in writing, a copy of the account, or be precluded from giving evidence thereof. The court or judge thereof may order a further account when the one delivered is too general, or is defective in any particular.”

A considerable portion of appellant’s brief is devoted to a discussion of the demand and the minute entry. It is said that both mention an itemized account, instead of a copy thereof, for which only the statute authorizes a demand. It is also said that the minute entry contains no direction to the plaintiff to furnish anything, and therefore is not in substance an order.

We shall not consider these technical objections, but assume, for the purpose of this case, that the demand was sufficiently accurate to be held as a compliance with the statute.

The theory upon which the district court proceeded was that the statute applies to actions on accounts stated as well as to those upon open, unsettled accounts. In suits upon the latter class of accounts the defendant is entitled to know the specific demand or demands made against him, and, when the complaint does not set forth the items of the charges making up the sum total, he is entitled to a bill of particulars to inform him of them, so that he may make proper defense. A copy of the account as kept by the plaintiff is the bill intended by the statute.

In an action upon an account stated, the situation is different. An account stated is an agreement between the parties, either express or implied, that all the items are correct. (*Voight v. Brooks*, 19 Mont. 374, 48 Pac. 549; *Auzerais v. Naglee*, 74 Cal. 60, 15 Pac. 371; 1 Waite's Actions and Defenses, 191.) The action is based upon the agreement, the consideration of which is the original account, and the agreement has the force of a contract. This contract is the cause of action, and the plaintiff must recover upon it, or fail in the action. (*Volkening v. De Graaf*, 81 N. Y. 268; *Holmes v. Page*, 19 Ore. 232, 23 Pac. 961; *Coffee v. Williams*, 103 Cal. 550, 37 Pac. 504; *Estee's Pleadings*, (4th Ed.) Vol. 1, 616.) It is therefore not necessary, nor is it permissible, to prove the items of the original account. They may not be inquired into or surcharged, except upon the ground of fraud, error or mistake in the ascertainment of the balance (*Auzerais v. Naglee, supra*; *Hawkins & Co. v. Long*, 74 N. C. 781), and then only when the fraud, error or mistake upon which the agreement is sought to be impeached is specifically alleged in the answer (*Auzerais v. Naglee, supra*; *Coffee v. Williams, supra*; *Kronenberger v. Binz*, 56 Mo. 121.)

Section 743, *supra*, can have no application to such a case. It, in terms, applies only to actions upon open, unsettled accounts, in which it is necessary to examine and establish the items going to make up the sum total, or an alleged balance

which is disputed in whole or in part. The requirement is that the plaintiff shall furnish the copy upon notice within a time specified or fixed by the parties or by order of the court, or be precluded from giving evidence in support of his claim. When the copy furnished is not specific or is indefinite, the court or judge may order an additional statement. If the copy is not furnished at all, the penalty may be exacted. If the further account is not furnished in obedience to the order, the penalty is not a refusal to hear evidence in support of the claim, but punishment as for a contempt. If, in an action upon an account stated, it should become necessary that the defendant have a bill of particulars, or otherwise ascertain the facts, in order that he may prepare his defense, the appropriate remedy would seem to be an application to the court for such a bill, or for an inspection of plaintiff's accounts, under Section 1810 of the Code of Civil Procedure. But however this may be, we have seen that Section 743 has no application to actions on accounts stated. It follows that the action of the court in sustaining the objection to evidence was error.

The judgment and order are therefore reversed, and the cause remanded, with directions to the court below to grant a new trial.

*Reversed and remanded.*

MR. JUSTICE MILBURN, not having heard the argument, takes no part in this decision.

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HAYS, APPELLANT, v. BUZARD ET AL., RESPONDENTS.

(No. 1,885.)

(Submitted May 2, 1904. Decided July 2, 1904.)

*Water Rights — Conveyances—Appurtenances — Evidence—  
Findings—Appeal—Review.*

1. Where a person owning a water right, rents land and uses a portion of the water on the land, such use of the water will not, of itself, furnish any ground for the inference that he intended to make his water right or any portion of it appurtenant to the land.
2. A person asserting that a water right and a ditch are appurtenant to certain land must prove that they are appurtenances and must connect himself with the title of the prior appropriator.
3. A deed of land together with all appurtenances, water rights and water ditches to the same belonging, and all the estate, title, interest, claim or demand of the grantor therein, conveys only such water rights as are appurtenant to the land.
4. Evidence examined and held, to justify the trial court in finding that a certain water right was not appurtenant to a particular piece of land.
5. The fact that some of the findings of the court are immaterial does not impair the effect of such as are material.
6. In an equity case, the judgment will not be reversed merely on the ground that some irrelevant or immaterial evidence was admitted at the hearing.
7. Where plaintiff in a suit to determine water rights asserted rights under a deed conveying all the appurtenances, water rights and water ditches, and all the interest of the grantor, evidence showing the exclusive use of the water by defendants for ten years, during which time neither plaintiff nor his immediate predecessor asserted any right thereto, justified the conclusion that plaintiff's claim was not well founded.
8. Under Laws of Second Extraordinary Session 1903, p. 7, authorizing the supreme court to review all questions of fact and of law in equity cases, in a suit to determine water rights, the findings will not be disturbed because of the erroneous admission of evidence, where the remainder of the evidence preponderates in favor of the findings.

*Appeal from District Court, Gallatin County; William L. Holloway, Judge.*

ACTION by Joseph A. Hays against Walter Buzard and another. From a judgment for defendants, and an order denying his motion for a new trial, plaintiff appeals. Affirmed.

*Mr. John A. Luce, for Appellant.*

Up to the time that William Herron deeded to Joseph Herron he was in exclusive possession and occupancy of the three 160-acre tracts, claiming and using the water upon them. The 200 inches of water had not been divided, but was in the nature of an easement in gross. However, upon the sale to Joseph Herron of the northwest quarter of section 20, with the appurtenances and water rights thereunto belonging, there was conveyed with this land as appurtenant thereto sufficient water for the proper irrigation of the 110 acres in cultivation upon said land at that

time, which the court has found to be at least 100 inches. (Civil Code, Secs. 1510, 1491, 4613; *Lampman v. Milks*, 21 N. Y. 505, 507; *Cave v. Crafts*, 53 Cal. 135, 137, 140; *Quinlan v. Noble*, 75 Cal. 250; 10 Am. and Eng. Ency. of Law, 2d Ed., 418-419; *Sparks v. Hess*, 15 Cal. 186; *Huttemeier v. Albro*, 18 N. Y. 48; *Beattie v. Murray Placer Min. Co.*, 15 Mont. 316; *Tucker v. Jones*, 8 Mon. 225; *Sweetland v. Olson*, 11 Mont. 27; *Smith v. Hope Mining Co.*, 18 Mont. 432, 438; *Sloan v. Glancy*, 19 Mont. 76; *G. F. W. W. Co. v. G. N. Ry. Co.*, 21 Mont. 503; *Farmer v. Ukiah Water Co.*, 56 Cal. 11, 14; *Dixon v. Schirmeier*, 42 Pac. 1092; Civil Code, Secs. 1078, 1255; *Crooker v. Benton*, 28 Pac. 953, 954; *Smith v. Denniff*, 24 Mont. 27.)

*Messrs. Hartman & Hartman*, for Respondents.

The first division of appellant's argument in his brief is based entirely on the proposition that when a deed of real estate passes all the appurtenances thereto belonging also pass unless reserved in the deed, and the authorities stated in his brief are to that effect. We concede the correctness of the legal propositions stated in that portion of the brief and in the authorities cited, but we insist that appellant begs the question that was tried, viz.: Was the 100-inch water right appurtenant to the land when the deed was made in 1895? If it was, it passed to appellant, and respondents have no case. If it was not, it did not pass, and appellant has no case. To argue that appurtenances pass with a deed conveying the land and its appurtenances is completely to beg the question. The difficulty under which appellant labored was his assumption that if the water right was ever used upon the tract of land it must necessarily become appurtenant thereto irrespective of the intentions of the parties owning the water right or the land. That this is not the law was clearly laid down in *Smith v. Denniff*, 24 Mont. page 20. It was there decided that a water right used upon a tract of land does or does not become appurtenant to the land according to circumstances. We submit that on the record appellant entirely failed to discharge the burden of proof upon him to show that the water



right in question was appurtenant to his land; that the evidence shows by a clear preponderance that it not only never was appurtenant to appellant's land, but was never intended so to be, and that for a period of ten years immediately prior to the commencement of the action the respondents had had the exclusive use and control of the two hundred inches of water constituting the water right decreed in the case of *Campbell v. Johnson*, and that therefore the judgment of the court below should be affirmed.

MR. CHIEF JUSTICE BRANTLY delivered the opinion of the court.

This action was brought to determine plaintiff's right to the use of 100 inches of water in Cotton Wood creek, in Gallatin county, Montana, together with a certain ditch conveying the same to and upon plaintiff's land, to-wit, the northwest quarter of section 20, township 3 south, of range 5 east of the Montana meridian. The defendant Lenora Herron is the owner of the southwest quarter of section 17 of the same township, and the defendant Walter Buzard is the owner of the northwest quarter of the same section. William Herron, the deceased husband of Lenora Herron, in 1878 made a timber culture entry of plaintiff's land. This claim he relinquished in 1881. In 1882 he made a desert entry of it, which was, upon relinquishment by him, canceled by the department in 1885. On the same day Joseph Herron, a brother, made a declaratory statement for it as a pre-emption claim, and finally secured a patent by cash entry in 1887. In 1889 Joseph Herron conveyed it to his brother William Herron by warranty deed, "together with all tenements, hereditaments, appurtenances, water rights and water ditches to the same belonging, and all the estate, title interest, claim or demand of said party of the first part therein." By a similar deed William Herron and his wife, a few days before the death of the former, in 1891, reconveyed to Joseph Herron. In 1892 Joseph Herron and wife conveyed to one John Hays.

In 1895 John Hays and wife, Joseph Herron and wife joining in the deed, conveyed to plaintiff. These latter three deeds contained a clause substantially the same as that in the deed from Joseph to William Herron. From 1878 to the time of his death, William Herron was also in possession of the west half of section 17, and cultivating it. The southwest quarter being within the terms of the grant by the United States to the Northern Pacific Railroad Company, the title to it was secured by him by conveyance from that company. He held the northwest quarter under a contract from the railroad company, but, by reason of a settlement made upon this quarter by one Towne prior to the taking effect of the grant, it was held by the land department that it was excluded from the grant and remained open to settlement under the laws of the United States. This holding was the result of a contest with the railroad company by Lenora Herron after the death of her husband. She was granted a preference right to enter it as a homestead. This she relinquished in favor of the defendant Walter Buzard, a son-in-law, who obtained patent for it as his homestead. His settlement was made in 1896, and final entry in 1901. By an order of the district court of Gallatin county, Lenora Herron had set apart to her the southwest quarter of section 17 as her probate homestead. Subsequently, in 1897, the heirs of William Herron by deed relinquished all their interest to Lenora Herron, with 200 inches of water in Cotton Wood creek, described as appurtenant to the land, with the ditches conveying the same. A few days afterwards Lenora Herron by deed conveyed to defendant Buzard the right to use 100 inches of the same water.

In the spring of 1882 William Herron constructed a ditch from Cotton Wood creek to and over all these lands. The creek runs in a northwesterly direction through the southwest quarter of section 17. Most of this quarter section and also of the land of the plaintiff is upon the bench, and, in order to convey water to this portion of it, the ditch was constructed from a point on the creek some distance above, and passes almost entirely around the plaintiff's land in such a way as to make it convenient to irri-

gate the plaintiff's land from it. In 1883, owing, probably, to the fact that all the water in the creek during the irrigating season had already been appropriated, and also to the fact that the ditch could not be used on the lands on the north side of the creek, including a part of the southwest quarter and all of the northwest quarter of section 17, William Herron purchased an undivided one-third interest in a ditch on the north side of the creek known as the "Brown Ditch," and the water conveyed thereby, amounting to 600 inches. In the record this water right is referred to as the "Roy Hunter water right," and is the one in which the plaintiff claims an interest to the extent of 100 inches. The 200 inches thus acquired had been appropriated by Hunter by two different diversions, one in 1870 and the other in 1878, thus making Herron's right, according to the record, date one-half from 1870 and the other from 1878. It was the latter right which the defendant Leonora Herron conveyed to Buzard in 1897. From and after its purchase William Herron used the water from his own ditch on the south side, or from the Brown ditch and other ditches from the north side, as best suited his purposes.

The complaint alleges, in substance, that the water right in question, to the amount of 100 inches, together with the ditch constructed by William Herron in 1882, belongs to plaintiff as an appurtenance to his land; that the water is necessary to make the land productive; and that it has been continuously used for agricultural purposes by the plaintiff and his grantors since its acquisition by the said Herron. It is further alleged that the defendants assert some interest therein adverse to the plaintiff; that in July, 1901, without right, they diverted it away from the ditches of the plaintiff and deprived him of the use of it, and that they threaten to continue this diversion, to the irreparable injury of the plaintiff.

The defendants filed separate answers denying that the ditch and water right claimed by the plaintiff are or ever were appurtenant to the lands of the plaintiff, or that the plaintiff or his grantors or predecessors in interest ever used the ditch in con-

troversy and the waters conveyed therein to the amount of 100 inches, or any amount, to irrigate plaintiff's lands, except by permission of the grantors and predecessors of the defendants, or that the plaintiff or his predecessors ever had any right to the use of said water in any amount. As affirmative ground of relief, they then allege title to their lands respectively, and allege that it is necessary to use all the water thereon in order to make them productive; that William Herron made continuous and uninterrupted use of it upon the lands of the defendants from the date at which he acquired it down to the date of his death; and that from that time down to the bringing of this action they themselves had been making continuous and uninterrupted use of it.

The court found the issues for the defendants, and entered judgment accordingly. From the judgment and an order denying him a new trial, plaintiff has appealed.

Plaintiff seeks a reversal of the judgment upon the grounds (1) that the evidence does not support the findings; (2) that the findings do not support the judgment, and (3) that the court erred to his prejudice in the admission of certain evidence.

The controversy between the parties is indicated by the synopsis of the pleadings, and presents the sole question: Did the interest claimed by plaintiff in the Herron ditch and Hunter water right pass to the plaintiff under the conveyances from Joseph Herron and his grantees to the plaintiff as an appurtenance to his land?

William Herron was never vested with the legal title to this land until he took under the conveyance from his brother Joseph. He then took it with such rights appurtenant thereto, and only such, as Joseph had. Joseph had no right in the water whatever, for there is nothing in the evidence tending to show that he had obtained any interest theretofore by virtue of any contract or agreement made with William at the time of his settlement upon the land or at any time thereafter. William abandoned his inchoate rights in the land in the year 1885. But the presumption, if any, which might otherwise be indulged in, that

he intended also to abandon his right to the water, is overturned by the fact, conceded by all parties, that he used it continuously down to the date of his death. Indeed, plaintiff's assertion of his right is founded upon the fact of such use by William Herron, and, if it be conceded that William Herron abandoned his right to the water at the time his desert entry was canceled, he thereafter had no title which he could convey, and the plaintiff's right, in so far as it is based upon his appropriation, must fail. When he permitted his desert entry to be canceled, he was still in possession of the west half of section 17, and this, under the evidence, required the use of the water to render its cultivation possible. So that, assuming the fact to be, as plaintiff claims, that the ditch of 1882 was constructed for the purpose of reclaiming plaintiff's land, and that the interest in the Hunter right was purchased in order to effect this purpose, yet this fact does not establish the plaintiff's claim, when considered in the light of his subsequent conduct and the assertion of the right by William Herron to the exclusive use of the water up to the time he acquired Joseph Herron's title.

Section 1882 of the Civil Code recognizes the right of an appropriator or owner of a water right to change the place of diversion, as well as the use and the place of use. It therefore does not follow that, because water has been appropriated for a particular use, it forever thereafter must be applied to that use. "The legal title to the land upon which a water right acquired by appropriation made on the public domain is used or intended to be used in no wise affects the appropriator's title to the water right, for the *bona fide* intention which is required of an appropriator to apply the water to some useful purpose may comprehend a use upon lands and possessions other than those of the appropriator, or a use for purposes other than those for which the right was originally appropriated. Section 1882, Civil Code; *Nevada Ditch Co. v. Bennett*, 30 Ore. 59, 45 Pac. 472, 60 Am. St. Rep. 777." (*Smith v. Denniff*, 24 Mont. at page 29, and page 401, 50 Pac., 81 Am. St. Rep. 408.)

The evidence shows that, during most of the years subsequent to the settlement by Joseph Herron in 1885 until the death of William, the latter rented the land from his brother, and used a portion of the water upon it. What portion was thus used is not made to appear. But this evidence does not furnish any ground for the inference that William Herron intended to make it, or any part of it, appurtenant to the land. If this could be so, then by using a water right upon leased lands the owner would incur the risk of losing it. The right was originally acquired upon the public domain. If the title to the land in no wise affects the title to the water right, the fact that it has been used at this or that place, or upon particular land, will not of itself determine its character as an appurtenance. "One who asserts that a water right and ditch are appurtenant to certain lands has the burden of proving that they are appurtenances, and must connect himself with the title of the prior appropriator." (*Smith v. Denniff, supra.*)

The right of the plaintiff must therefore depend upon the interpretation to be given to the deeds furnishing the chain of title from William Herron to the plaintiff, for, as we have seen, the use of the water had not become appurtenant to plaintiff's land prior to the date of Joseph Herron's deed to William Herron. This deed purported to convey, and did convey, all rights which were appurtenant. (*Sweetland v. Olsen*, 11 Mont. 27, 27 Pac. 339; *Tucker v. Jones*, 8 Mont. 225, 19 Pac. 571; *Kimpton v. Jubilee Placer Mining Co.*, 16 Mont. 379, 41 Pac. 137, 42 Pac. 102.) But the right in question, being the exclusive property of William Herron, was not affected by it.

What rights, therefore, does the plaintiff appear to have acquired in the water under that deed, in the light of the facts as they then existed, and the behavior of the parties with reference to it down to the commencement of this action? This deed does not, nor does any of the others following it, describe any particular right. They only purport to convey such rights as were appurtenant. The evidence tends to show that William Herron used the water upon the Joseph Herron (the plaintiff's) land

during the time he held title to it, just as he did during the years when he was renting it. After the execution of the deed, and down to the commencement of this action, his widow used it upon the west half of section 17 until she relinquished the northwest quarter to the defendant Buzard in 1897, and that thereafter she and Buzard used it exclusively upon the same land. Buzard claimed his right under his deed from the widow. The evidence, it is true, is somewhat conflicting, and some of the witnesses testify that the plaintiff and his predecessors and tenants have used it continuously from the date at which William Herron executed the deed. The findings of the court, however, we think are fully justified by all the facts appearing in evidence, and should not be disturbed.

Without attempting to analyze the evidence and to state in detail our reasons for this conclusion, we shall briefly refer to one fact which seems to us significant. In 1890, just after the deed executed by Joseph Herron to his brother William, the latter, with others, brought an action to have the relative priorities to the rights in the water of Cotton Wood creek settled and determined. This action resulted in a decree under which William Herron was adjudged to have the title to the use of 100 inches by an appropriation made in 1870, and 100 inches by an appropriation made in 1878. Thereupon the parties employed a ditch tender to distribute the water during the irrigating season in accordance with the terms of the decree. This ditch tender was a witness, and testified that, from the date of the decree until the bringing of this action, he had distributed the water from year to year until the bringing of this action, awarding the 200 inches in controversy here to William Herron and to the defendants as his successors, and that the use made of any part of it by the plaintiff or his tenants, or any of his predecessors under the deeds subsequent to William Herron's deed to Joseph, was by permission of William Herron or the defendants. This exclusive use of the water by the defendants during all the years from 1891 to 1901, when this action was commenced, together with the fact that in the meantime neither

plaintiff nor John Hays, his immediate predecessor, asserted any right to it, justifies the conclusion that plaintiff's claim is not well founded.

The findings of the court upon the evidence are very full. Some of them are immaterial. This fact, however, does not impair the effect of such as are material and upon the issue actually involved in the controversy. The findings upon the material issue fully sustain the judgment.

The particular items of evidence of the admission of which complaint is made are alleged declarations made by William Herron, at the time he executed the deed to Joseph, that there was no water right appurtenant to the land conveyed, and that he did not intend to convey any water right, and also certain testimony by Joseph Herron that he never had or claimed any interest in the Hunter water right. It is urged that this testimony was incompetent and prejudicial to the plaintiff. Without pausing to determine the question whether the evidence was in fact incompetent, but assuming it to be so, we do not think its admission sufficient to warrant a reversal of the judgment. This is an equity case, and was tried by the court sitting without a jury. In such case the result will not be overturned merely on the ground that some irrelevant or incompetent evidence was admitted at the hearing. In such case, if the incompetent evidence is so unimportant and trifling, as compared with the competent evidence introduced and considered, that it is apparent that the result reached was probably not based upon the incompetent evidence, it will be presumed that such evidence was disregarded by the court when it came to make its findings. (*Cobban v. Hecklen*, 27 Mont. 245, 70 Pac. 805.) But, conceding that the trial court was probably influenced in its conclusions by the evidence alleged to be incompetent, yet this court is authorized by the Act of the Second Extraordinary Session of 1903 (Laws Second Extra. Sess. 1903, Chapter I) to review and determine all the questions of fact as well as of law in equity cases, and to render such judgment therein as the cir-



cumstances may justify, if upon the record it appears that it is not necessary to remand the cause for another hearing. It appears from this record that the parties had ample opportunity to introduce, and probably did introduce, all the evidence applicable, and that a hearing of other evidence is not necessary in order finally to settle and determine the rights of the parties. Excluding the evidence complained of, and weighing the remainder of it in the record in order to determine the rights of the parties thereon as an original proposition, we think that the findings of the trial court should not be disturbed, as the evidence preponderates in favor of the conclusions reached by it.

The judgment and order are affirmed.

*Affirmed.*

MR. JUSTICE HOLLOWAY, being disqualified, takes no part in this decision.

Rehearing denied.

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SATHRE, RESPONDENT, v. ROLFE ET AL., APPELLANTS.

(No. 1,918.)

(Submitted June 14, 1904. Decided July 2, 1904.)

31	85
32	472

*Parol Evidence—Varying Written Contract—Fraud—Sales—Validity—Purchase-Money Notes—Assignment—Bona Fide Purchaser—Defenses.*

1. Plaintiff alleged mistake and fraud, and the evidence disclosed that the inducement held out to plaintiff to sign an agreement was based on fraudulent representations of defendants that a lease need not be mentioned in a contract of sale of a business and the lease. *Held*, that evidence was admissible showing the purchase of the lease and defendants' fraudulent conduct, over objection that it varied the contract.
2. Where plaintiff purchased a leasehold interest, paid the consideration, and went into possession of the premises with defendants' consent, and the promise to obtain the transfer of the lease was the inducement to sign a

contract, omitting mention of the lease, on the sale of a business, defendants, without placing plaintiff in *statu quo*, could not assert that the promise to procure the lease was void under the statute of frauds.

3. Where a contract of sale of a business omitted reference to a leasehold interest by fraudulent representations of defendants as to the lease being a separate writing, evidence showing the purchase of the leasehold interest was admissible, as being independent and collateral to the portion which was reduced to writing.
4. Where defendant assigned notes given as consideration on the sale of a business, which he induced by fraud, to a third person as security for a pre-existing debt, such third person was not a *bona fide* holder, and the notes were subject to all the defenses which might have been urged against them in the hands of defendant.

*Appeal from District Court, Silver Bow County; E. W. Harney, Judge.*

ACTION by Sophie Sathre against Christina Rolfe and others.  
From a judgment for plaintiff, defendants appeal. Affirmed.

*Mr. B. S. Thresher*, for Appellants.

*Mr. George M. Bourquin*, for Respondent.

MR. COMMISSIONER CLAYBERG prepared the following opinion for the court:

Appeal from a judgment against defendants. The facts as disclosed by the record are, briefly, as follows: Defendant Rolfe was proprietress of the Red Boot lodging house, in the city of Butte; she occupied the premises under an unexpired written lease from O'Rourke. Defendant Wilson was a real estate agent having his office in this lodging house, and negotiated an oral agreement for the sale of the business of defendant Rolfe to plaintiff Sathre, for the sum of \$1,850. By this oral agreement the sale included the leasehold interest in the property, as well as the furniture and fixtures used in the business. Wilson undertook to reduce the oral agreement to writing, but fraudulently omitted therefrom all mention of the leasehold interest. Plaintiff testified as to this transaction as follows: "Mr. Wilson asked me to sign the agreement, or the contract, and read it over, and when I saw the lease was not mentioned in it I said, 'Why,

hadn't the lease ought to be mentioned in this?' and he said: 'No, that is not necessary; that is a separate paper by itself; I will get that paper, and will give it to you.' He says: 'This don't amount to anything anyhow, and it is just a custom that real estate men have and use'; and I believed I could rely on what he said, and signed it."

The complaint alleges, among other things, that said defendants, "with intent to deceive and defraud the plaintiff, did knowingly, falsely and fraudulently represent to her that they had the right to and could sell said lease and vest plaintiff with a good title thereto, and promised plaintiff that, if she would purchase the property aforesaid, they would procure the consent of the lessor to the sale of said lease to plaintiff. That the plaintiff, believing and relying on said representations and promise, and induced thereby, and without knowledge to the contrary, purchased said lease and the contents of said lodging house from said defendants, and paid them therefor the sum of \$1,850. \*

\* \* That, on or about the time aforesaid, said defendants procured plaintiff to sign an agreement to purchase, intended to express said contract, in which the said lease and its sale to plaintiff was not set out. That she signed said agreement, relying on and believing said defendants' assurances then made, viz., that the said lease, being a separate writing, need not be mentioned in said agreement, but itself would be delivered to her when received by said defendants from the lessor, and thereby induced thereto, and by said defendants' promise to secure and deliver said lease to her, which promise was made by them with no intent to perform the same."

It is also alleged that the lease was not assignable without the consent of the lessor, and that he refused such consent, and that the promise of defendants to procure the lessor's consent to the agreement of sale was made "without any intent to perform the same, and to deceive and defraud plaintiff." That plaintiff paid \$1,300 in cash, and gave defendant Rolfe her promissory notes for the remaining \$550, secured by chattel mortgage upon the furniture so purchased. Plaintiff prayed for the surrender

and cancellation of these notes and chattel mortgage, and for a recovery of a portion of the consideration paid. She succeeded in obtaining such decree, and defendants appeal.

Upon the trial of the case plaintiff offered testimony to show the original purchase of this leasehold interest, and the fraudulent acts, representations and conduct of defendants Rolfe and Wilson as alleged, which was objected to on the ground that it varied the terms of the written contract, and was inadmissible under Section 2186 of the Civil Code, which reads as follows: "The execution of a contract in writing, whether the law requires it to be written or not, supersedes all the oral negotiations or stipulations concerning its matter which preceded or accompanied the execution of the instrument."

Section 3132 of the Code of Civil Procedure provides: "When the terms of an agreement have been reduced to writing by the parties, it is to be considered as containing all those terms, and therefore there can be between the parties and their representatives, or successors in interest, no evidence of the terms of the agreement other than the contents of the writing, except in the following cases: (1) Where a mistake or imperfection of the writing is put in issue by the pleadings. (2) Where the validity of the agreement is the fact in dispute. But this section does not exclude other evidence of the circumstances under which the agreement was made, or to which it relates, as defined in Section 3136, or to explain an extrinsic ambiguity, or to establish illegality or fraud. The term 'agreement' includes deeds and wills, as well as contracts between parties."

Section 2117 of the Civil Code provides: "Actual fraud, within the meaning of this chapter, consists in any of the following acts, committed by a party to the contract, or with his connivance, with intent to deceive another party thereto, or to induce him to enter into the contract: \* \* \* (4) A promise made without any intention of performing it; or, (5) any other act fitted to deceive."

Section 2123 of the Civil Code provides: "Mistake of law constitutes a mistake within the meaning of this article, only

when it arises from: \* \* \* (2) A misapprehension of the law by one party, of which the others are aware at the time of contracting, but which they do not rectify."

It is apparent that the complaint alleges a mistake or imperfection in the writing, fraud, and the invalidity of the written agreement. It is equally apparent that the oral evidence was offered to establish such mistake, imperfection, illegality and fraud.

The allegations of the complaint and the testimony offered by plaintiff show that the defendants Rolfe and Wilson well knew that the original lease from O'Rourke to Rolfe was not assignable without the consent of O'Rourke; that plaintiff at the time she made the purchase and signed the written contract had never seen the lease, and had no knowledge that it contained such provision. Plaintiff alleges that they promised her to procure the consent of O'Rourke to the assignment and transfer of the lease to her without any intention of performing said promise, and the testimony offered in the case tends to support that contention. Proof was also introduced which tended to show acts on the part of defendants Rolfe and Wilson "which were fitted to deceive" and did deceive the plaintiff. Both Rolfe and Wilson had knowledge of the fact that the lease from O'Rourke was not assignable without his consent, and the proof shows that the plaintiff at the time she signed the agreement knew nothing of the contents of the lease. There is no proof that the defendants honestly tried to obtain the consent of O'Rourke to the transfer of the lease. In their answer they deny that the leasehold interest was ever to be transferred to the plaintiff. So we must conclude that the record discloses actual fraud on the part of defendants Rolfe and Wilson in obtaining plaintiff's signature to the contract; that they made a promise which they did not intend to fulfill; that they knew the contents of the lease, and that it could not be transferred to plaintiff without the consent of O'Rourke; that plaintiff was ignorant of its contents; that they never honestly attempted to obtain such consent; that the inducement

held out to plaintiff to sign the agreement was based upon the fraudulent representations of defendants Rolfe and Wilson to the effect that the leasehold interest need not be mentioned in such contract, but that they would obtain it and deliver it to plaintiff. By these facts the plaintiff has shown a clear right to the equitable relief demanded, and under the above sections of the statute she had a right to make such showing, and the court did not err in admitting the testimony objected to.

Appellants' counsel insist that the oral sale of the leasehold interest was void under the statute of frauds. Under the facts and law above stated, we deem this proposition entirely immaterial. Plaintiff purchased the leasehold interest, paid the consideration therefor, and went into possession of the premises with the full consent of the defendants. The promise to obtain the transfer of the lease was the inducement for plaintiff's signing the contract. It would be extremely inequitable to hold that, after defendants had procured the consideration from the plaintiff and put her in possession of the property, they could come in, without placing plaintiff in *statu quo*, and assert that, notwithstanding such facts, their promise to procure the lease was void under the statute of frauds. They cannot thus benefit by their own fraudulent and wrongful acts and conduct.

The admissibility of the parol proof offered is so clear under the above statutes that we have not considered the question as to whether this proof was not also admissible upon the theory that an oral contract had been entered into, a portion of which had been reduced to writing and a portion of which had been fraudulently omitted from the writing, the omitted portion being independent of and entirely collateral to that portion which was reduced to writing. In the judgment of the writer of this opinion, this parol proof was equally admissible under this theory.

This leaves but the question as to the validity of the judgment against Beck. Four of the notes given were assigned to Beck as security for the payment of a pre-existing debt of defendant Rolfe. They were not indorsed to Beck, but assigned to him by

a separate instrument. He was in no sense a *bona fide* holder, and the notes were therefore subject to all the defenses which might have been urged against them had they remained in the hands of defendant Rolfe. (2 Randolph, Neg. Insts. 788, 789; 1 Daniels, Neg. Insts. 741.) There can be no doubt but that the plaintiff had a right to have the notes and chattel mortgage canceled in the hands of defendant Rolfe, and, inasmuch as defendant Beck simply stands in her shoes, they were subject to cancellation in his hands.

We advise that the judgment be affirmed.

PER CURIAM.—For the reasons stated in the foregoing opinion, the judgment is affirmed.

MR. JUSTICE MILBURN, not having heard the argument, takes no part in this decision.

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POTTER, RESPONDENT, v. LOHSE, APPELLANT.

(No. 1,882.)

(Submitted April 23, 1904. Decided July 2, 1904.)

31	91
32	593
31	91
35	17

*Chattel Mortgages—Sale by Mortgagee—Rights of Purchaser—Subrogation — Acknowledgment of Title—Conversion—Actions—Parties—Pleading—Counterclaims—Instructions.*

1. Where a mortgagee of a chattel rightfully in possession thereof sells it to another, the mortgagor, who has neither paid nor tendered the mortgage indebtedness, has no right of possession such as to entitle him to maintain conversion against the purchaser.
2. A *bona fide* purchaser of property for value from a pledgee of the same, who sold it in violation of the pledge, succeeds to all the rights of the pledgee, and under Civil Code, Section 4602, which makes the rule the same when the reason is the same, a purchaser from a chattel mortgagee will likewise succeed to the rights of his grantor with respect to the property purchased, on the principle of subrogation, although there is no contract of assignment between him and his grantee.

3. Subrogation—an equitable defense—may be pleaded to a legal cause of action.
4. A defendant may plead inconsistent defenses in the same answer, and may rely on them at the trial, subject to instructions as to their proper effect. Thus defendant in conversion may assert rights as absolute owner and as mortgagee.
5. Under Code of Civil Procedure, Section 691, providing that a counterclaim must arise out of the transaction set forth in the complaint as the foundation of plaintiff's claim, or connected with the subject of the action, a judgment cannot be set off against an action of conversion, but defendant's remedy is by bill in equity or other proceeding to offset one judgment against the other.
6. In an action for conversion by the mortgagor of a chattel against a purchaser from the mortgagee, who has theretofore become subrogated to the rights of such mortgagee by operation of law, the mortgagee is not a necessary party to give defendant complete protection against plaintiff.
7. In conversion by a mortgagor of a chattel against a purchaser from the mortgagee who was rightfully in possession, a charge to find for plaintiff if he was the owner of the property and defendant had knowledge of his rights, was erroneous, as ignoring the question of plaintiff's right to possession.
8. The taking of a mortgage on a chattel by defendant's grantor in January is no acknowledgment by defendant, who purchased the chattel from his grantor in the following March, of the mortgagor's title.

*Appeal from District Court, Silver Bow County; William Clancy, Judge.*

ACTION by David Potter against Fred Lohse. From a judgment for plaintiff, and from an order denying a new trial, defendant appeals. Reversed.

*Messrs. Kirk & Clinton, for Appellant.*

This action is the old action of trover, although it is referred to here as an action for conversion. In such an action plaintiff must prove: (1) A right of property either general or special; and (2) possession or immediate right to the possession of the property at the time of the alleged conversion. He must establish not one, but both of these elements. (21 Ency. Plead. and Prac. 1039-41, and notes; *Stowell v. Otis*, 71 N. Y. 36; *Johnson v. Cormley*, 10 N. Y. 576; *Clements v. Yturria*, 81 N. Y. 286; *Lewis v. Morley*, (N. C.) 34 Am. Dec. 380; *Poole v. Symonds*, (N. H.) 8 Am. Dec. 72; *Kennett v. Peters*, (Kan.) 37 Pac. 999; *Middlesworth v. Sedgwick*, 10 Cal. 392; *Tuscony v. Orr*, 49 Cal. 612; *Edwards on Bailments*, Sec. 315; *Story on*



Bailments, Secs. 93 and 394; *Wetzell v. Power*, 5 Mont. 217; *Swenson v. Kleinschmidt*, 10 Mont. 477.)

In an action for conversion defendant may, under a general denial, prove that the property belonged to himself or a third person. (*Staubach v. Rexford*, 2 Mont. 566.)

*Mr. Charles E. Oles*, and *Mr. J. E. Healy*, for Respondent.

The rights of the parties must be determined upon the date of the commencement of the action, and not upon matters arising subsequently. The defense was a denial of the allegations of the complaint; but even if a counterclaim was interposed it would have to be such as related to the same transaction and the same subject-matter of action; not only this, but it must be such as existed at the time of the commencement of the action. (Code of Civil Procedure, Sec. 691; *Babcock v. Maxwell*, 21 Mont. 507; *McGuire v. Lamb*, 17 Pac. 750; *McGuire v. Edsall*, 14 Mont. 359; 19 Am. Ency. Pl. and Pr. page 760; *Pomeroy*, Code Remedies, 3d Ed., Sec. 797.)

We submit that the same rule of law should govern as to chattel mortgages which is established with regard to real mortgages: That the mortgagee is estopped to deny the title of the mortgagor. (Ency. of Law, Mortgages, page 1005; Ency. of Law, Estoppel, page 444; *Upchurch v. Anderson*, 52 S. W. 917.)

The evidence upon the trial was conflicting regarding the value of the property. The affidavits are but contradictory of the plaintiff's witnesses, and cumulative of the evidence adduced by the defendant's witnesses. Such affidavits are not sufficient to warrant consideration; more than this, such affidavits do not show diligence. (See cases cited in Annotations to Code of Civil Procedure, Sec. 1171.)

MR. COMMISSIONER POORMAN prepared the following opinion for the court:

This is an action in conversion. The plaintiff had judgment in the district court, and from this judgment and an order over-

ruling defendant's motion for a new trial, the defendant appeals.

1. The defendant purchased certain personal property from one Wadsworth. The defendant sold a part of this property, and plaintiff then commenced this action to recover from the defendant the value of the property, alleging conversion thereof.

It appears from the evidence that the plaintiff, Potter, in August, 1900, gave to Wadsworth an absolute bill of sale of the property in question. Afterwards, on January 11, 1901, Potter executed to Wadsworth a chattel mortgage on this same property to secure the payment of a note for the sum of \$200, executed and delivered by Potter to Wadsworth on that day, and due three months after date, with interest. The mortgage is in the usual form, and provides that the mortgagee may take possession of the property under the conditions usually provided in such mortgages. It is admitted that on March 1, 1901, Wadsworth took absolute possession of the property, locked the building in which it was kept, and refused admittance to Potter. The right of the mortgagee to such possession was not disputed. On March 5, 1901, the defendant, Lohse, purchased this property from Wadsworth, paying \$247.50 therefor, and on the succeeding day, through his agent, took possession of it. Potter at the time was present, and made no objection to the transfer. Plaintiff, Potter, has not paid nor offered to pay the mortgage indebtedness. It appears, therefore, that at the time of the sale to defendant the mortgagee was in possession of this property, claiming to be the owner thereof; and it does not appear from this record that the plaintiff, at the time the defendant acquired possession of the property, or at the time this action was commenced, had the right to the possession thereof.

The action of conversion under our Code is the same as the common-law action of trover. In *Harrington v. Stromberg-Mullins Co.*, 29 Mont. 157, 74 Pac. 413, this court said: "The party complaining 'must have had, when the goods were taken, a general or special property in them, and a right to the immediate possession.'" (*Glass v. Basin & Bay State M. Co.*, 31

Mont. 21, 77 Pac. 302; *Wetzel v. Power*, 5 Mont. 214, 2 Pac. 338; *Reardon v. Patterson*, 19 Mont. 231, 47 Pac. 956; *Binnian v. Baker*, 6 Wash. 50, 32 Pac. 1008; *Swenson v. Kleinschmidt*, 10 Mont. 473, 26 Pac. 198; *Laubenheimer v. Bach, Cory & Co.*, 19 Mont. 177, 47 Pac. 803; *Kennett v. Peters*, 54 Kan. 119, 37 Pac. 999, 45 Am. St. Rep. 274; 21 Ency. Pl. and Pr. 1062.)

The mortgagor undoubtedly has his remedy for any damage caused by fraud or injury to or sacrifice of the property by the mortgagee in possession, or by any one in collusion with him; but no such facts appear in this case.

2. At the trial it was claimed by the plaintiff that this bill of sale which he executed to Wadsworth was, in effect, a mortgage, and that it was canceled by the subsequent mortgage. The defendant, however, testified that he purchased the property believing that Wadsworth was the sole owner, and asked permission to amend his pleading; that he be subrogated to the rights of Wadsworth as mortgagee, and permitted to set up a judgment which he held against the plaintiff, and that Wadsworth be made a party to the suit. This the court denied.

The theory of the plaintiff in this action is that Wadsworth was only a mortgagee in possession of the property. Wadsworth was a witness in the case, and testified: "My reason for selling the horses to Lohse was that I wanted to get my money out of the bill of sale, and did not want to be bothered with a lawsuit. That is how Lohse and I arrived at the particular sum of \$247.50. It was the amount of Potter's indebtedness to me. That amount was just reckoned up—itemized up." It appears from this and other evidence of Wadsworth that the amount of money that he received from his grantee, Lohse, was the amount Wadsworth claimed to be due to him from the plaintiff, Potter. This record shows that the mortgagee, at the time this suit was tried, had not disposed of the note described in this mortgage, and that the same was then past due; and it further appears that defendant, Lohse, had not made voluntary payment of plaintiff Potter's debts.

The rule with reference to pledgees is, "A *bona fide* purchaser of property for value from a pledgee of the same, who sold it in violation of the pledge, succeeds to all the rights of the pledgee." (*Brittan v. Oakland Bank of Savings*, 124 Cal. 282, 57 Pac. 84, 71 Am. St. Rep. 58; *Williams v. Ashe*, 111 Cal. 180, 43 Pac. 595.) This same principle was recognized by this court in *Reardon v. Patterson et al.*, 19 Mont. 231, 47 Pac. 956. It is difficult to distinguish in principle, then, between a purchase from a pledgee and the purchase from the mortgagee by the defendant, Lohse, under the circumstances of this case. "Where the reason is the same the rule should be the same" (Civil Code, Section 4602) to the extent of permitting Lohse, the purchaser from the mortgagee, to succeed to the rights of his grantor with respect to the property purchased. It is true there was no contract between the mortgagee and his vendee that this note and mortgage should be assigned to the vendee, but "the right of subrogation or of equitable assignment is not founded upon contract, nor upon the absence of contract, but is founded upon the facts and circumstances of a particular case and upon principles of natural justice." (See note to *Crumlish's Administrator v. Improvement Co.*, (Va.) 23 L. R. A. 120.)

It is also true that subrogation is an application of the principles of equity, but in this state an equitable defense may be pleaded to a legal cause of action. (Boone, Code Pleading, par. 78; *Power v. Sla*, 24 Mont. 243, 61 Pac. 468.)

It is likewise true that the defenses of absolute ownership and of rights as a mortgagee are inconsistent; but as was stated in *Ball v. Gussenhoven*, 29 Mont. 321, 74 Pac. 871: "We recognize the rule that a defendant is entitled to plead in the same answer as many defenses as he may wish to present, even though they are inconsistent with each other, and is entitled to present and rely upon any of such defenses upon the trial of the case; subject, however, to proper instructions to the jury as to their proper effect in each case."

The judgment which the defendant, Lohse, holds against the plaintiff, Potter, cannot properly be pleaded in this action as a

setoff or counterclaim. Under Section 691 of the Code of Civil Procedure, in an action in tort the defendant cannot counterclaim any new matter not arising out of the transaction set forth in the complaint as the foundation of the plaintiff's claim, or connected with the subject of the action. (*Davis v. Frederick*, 6 Mont. 300, 12 Pac. 664.)

The converse of this proposition was held in *Collier v. Ervin*, 3 Mont. 142, where this court said: "A counterclaim founded upon a tort cannot be set off against a claim founded upon contract." The court, further construing the statute, says: "The counterclaim must arise out of the transaction set forth in the complaint as the foundation of plaintiff's claim, or connected with the subject of the action. \* \* \* The words in our statute 'subject of the action' should be construed, not as relating to the thing itself about which the controversy has arisen, but as referring rather to the origin and grounds of the plaintiff's right to recover or obtain the relief asked." (See, also, *Boley v. Griswold*, 2 Mont. 447; *Wells v. Clarkson*, 2 Mont. 230, 339; *Roush v. Fort*, 3 Mont. 175; *Wells, Fargo & Co. v. Clarkson*, 5 Mont. 336, 5 Pac. 894; *Story & Isham Commercial Co. v. Story*, 100 Cal. 30, 34 Pac. 671.)

Section 501, Code of Civil Procedure of New York, is the same as Section 691, Code of Civil Procedure of Montana. In construing this section the Supreme Court of New York, in *Eckert v. Gallien*, (Sup.) 53 N. Y. Supp. 879, says: "The action is in tort, and none of the counterclaims state a cause of action arising out of the contract or transaction set forth in the complaint, or connected with the subject of the action. They are therefore not proper counterclaims in such an action." (*Ferris v. Armstrong Mfg. Co.*, (Sup.) 10 N. Y. Supp. 750; *Chambers v. Lewis*, 11 Abb. Prac. 210; *People v. Dennison*, 84 N. Y. 272, 59 How. Prac. 157; *Pattison v. Richards*, 22 Barb. 143; *Smith v. Hall*, 67 N. Y. 48.)

In *Lehmair v. Griswold*, 40 N. Y. Super. Ct. 100, the court says: "The words 'the subject of the action' mean the facts constituting plaintiff's cause of action."

The remedy of the defendant, in the event of a judgment being taken against him in this case, is by bill in equity, or other appropriate proceeding to offset the one judgment against the other. (*Russell v. Conway*, 11 Cal. 93; *Duff v. Hobbs*, 19 Cal. 659; *Lyon, Adm'r, v. Petty*, 65 Cal. 322, 4 Pac. 103; *Duncan v. Bloomstock*, 13 Am. Dec. 728, 2 McCord, 318; *Hovey v. Morrill*, 61 N. H. 9, 60 Am. Rep. 315; *Quick, Adm'r, v. Durham*, 115 Ind. 302, 16 N. E. 601; *Puett v. Beard*, 86 Ind. 172, 44 Am. Rep. 280; *Green v. Conrad*, 114 Mo. 651, 21 S. W. 839.)

The assignment of the note and mortgage to defendant being made by operation of law, Wadsworth is not a necessary party to the suit in order to give the defendant complete protection as against the plaintiff, and the court therefore did not err in refusing to make Wadsworth a party at the instance of the defendant over the objection of plaintiff.

Plaintiff's instruction No. 1, given by the court, is as follows: "The jury are instructed that in this case the action is one which is called conversion—that is, the plaintiff alleges that the defendant Lohse has taken plaintiff's property from him, and converted the same to his (Lohse's) own use. If you find that the plaintiff was the owner of the property at the time of the taking of said property by the said Lohse, and that Lohse had knowledge of the plaintiff's rights therein and thereto, then you will find for the plaintiff and against the defendant for such amount as you find the value of the property under the evidence to have been, at the time of the said taking, in the market at Meaderville." This instruction entirely ignores all question as to the plaintiff's right of possession, and is therefore erroneous.

Plaintiff's instructions Nos. 2 and 3 were given by the court upon the theory that the defendant was not entitled to be subrogated to the rights of the mortgagee, and would therefore be inapplicable upon a retrial of this case. Instruction No. 3 is also erroneous in that it instructs the jury that the taking of

the mortgage by Wadsworth was equivalent to an acknowledgment of plaintiff's title by the defendant. This mortgage was executed on the 11th of January, and the purchase by the defendant from Wadsworth was not made until the 5th and 6th of March following.

Defendant's instruction No. 1, as given by the court, is also erroneous. The words therein, "and you further find that said Wadsworth owned the same," should be stricken from the instruction, and the words "was present at and" should be inserted in the instruction immediately following the name "Potter" and before the word "knew."

Defendant's instruction No. 2, which the court refused to give, is incomplete. To make it sufficient, there should be inserted therein the word "plaintiff's" immediately preceding the word "title," where the same occurs in the phrase "notice of title"; also the phrase "but in plaintiff" should be inserted immediately following the name "Wadsworth," and preceding the word "and," where the same occurs in the phrase "said Wadsworth, and unless he has done so."

The other errors complained of can hardly arise upon a retrial.

We think the judgment and order appealed from should be reversed, and the cause remanded for a new trial.

PER CURIAM.—For the reasons stated in the foregoing opinion, the judgment and order are reversed, and the cause is remanded for a new trial.

MR. CHIEF JUSTICE BRANTLY, not having heard the argument, takes no part in this decision.

## MUELLER, RESPONDENT, v. RENKES, APPELLANT.

(No. 1,893.)

(Submitted April 28, 1904. Decided July 2, 1904.)

*Mortgages — Nature—Interest of Mortgagee—Cancellation—Release — Effect—Fraudulent Conveyances — Evidence—Sufficiency.*

1. A mortgage itself does not create or alienate an estate in real property, but is a mere security for the payment of a debt or the discharge of an obligation. (Section 3810 *et seq.*, Civil Code.)
2. While a mortgage is a conveyance (Section 1642, Civil Code), it is a conveyance of only a chattel interest.
3. A mortgage being a mere lien executed for the benefit of the mortgagee, it may be canceled or released by him at any time with or without consideration, and with or without the consent of the mortgagor.
4. The purchaser of mortgaged real estate does not thereby become personally liable for the indebtedness.
5. When a mortgage is released, a *bona fide* purchaser holds the premises free of the mortgage, whether the purchase was made prior or subsequent to the release.
6. Under Civil Code, Section 2170, one attacking the release of a mortgage, which was given to him and released by himself, in the manner prescribed in Civil Code, Section 3845, assumed the burden of showing the existence of facts sufficient to warrant a court of equity in setting it aside.
7. One who had a mortgage on lands securing his debt discharged the same of record, and subsequently sued at law on the note which was secured by the mortgage, attached the land which had been mortgaged, and purchased it at judicial sale, the land having before the discharge of the mortgage been conveyed by the mortgagor to a third person. *Held*, in a suit by such person to quiet title, that a finding that the mortgage was not a lien on the property at the time the suit to quiet title was commenced was warranted.
8. Mere inadequacy of consideration is not of itself sufficient cause to invalidate a conveyance, except in extreme cases.
9. The mere fact that a conveyance of land is from a daughter to her mother, or *vice versa*, is not sufficient to stamp it with fraud.
10. Where the owner of land conveyed the same to one to whom the owner was indebted for advances, the real consideration being \$2,100, and between \$800 and \$1,200 having been paid on the execution of the deed, the balance being covered by the advances, though the nominal consideration in the deed was only \$1, such conveyance was not fraudulent as to creditors.

*Appeal from District Court, Silver Bow County; E. W. Harney, Judge.*

Suit by Lena Mueller against George Renkes. From a judgment in favor of complainant, and from an order overruling a motion for a new trial, and from a judgment overruling an application for a receiver, defendant appeals. Affirmed.



*Mr. John J. McHatton*, for Appellant.

*Mr. J. N. Kirk*, and *Mr. John Lindsay*, for Respondent.

MR. COMMISSIONER POORMAN prepared the following opinion for the court:

This case stands for review on appeals on the part of defendant from a judgment rendered against him, from an order of the court overruling his motion for a new trial, and from the action of the court in overruling his application for the appointment of a receiver.

The action is one to quiet title. The complaint contains the allegations of possessory right, of possession and ownership, and other allegations usually found in such complaints, and that the defendant claims to own some interest in the property adverse to the plaintiff. The defendant denies the allegations of the complaint, and alleges as a separate defense and counterclaim that one Mrs. Mosherosh, the grantor of the plaintiff, on July 16, 1895, for a valuable consideration delivered to this defendant her promissory note dated July 16, 1895, for the sum of \$2,450, due one year after date, with interest; that the maker of the note, who was then the owner of the property described in the complaint, on that day executed a mortgage to the defendant on said property to secure the payment of this note; that the note has never been paid; that on the 8th day of June, 1898, "this defendant, not knowing the effect of this act, canceled such mortgage upon the records of said county," the note not then having been paid; that this mortgage was recorded on the day of its execution; that on the 6th day of May, 1896, the said Mrs. Mosherosh made a pretended conveyance of this property to the plaintiff; that subsequently, and on the 20th day of December, 1898, this defendant "commenced a suit in" the district court, "entitled 'George Renkes, plaintiff, against Emma Mosherosh, defendant,'" to recover the amount due Renkes upon this promissory note; that judgment therein was entered for the plaintiff,

Renkes, by default; that Renkes, at the time of the commencement of that action, filed an affidavit and undertaking on attachment, and caused this property to be attached; that an execution was issued and the property sold under the judgment so obtained by the said Renkes, and was bid in by him; that the pretended conveyance from Mrs. Mosherosh to the plaintiff in this action was made for the purpose of hindering and delaying the creditors of the said Mrs. Mosherosh, and that the plaintiff in this action, Mrs. Mueller, now holds the property in trust for the said Mrs. Mosherosh. The plaintiff filed a replication denying these allegations so far as they relate to the matters in issue between the plaintiff and defendant in this action.

The defendant claims that some of these denials relating to this new matter and counterclaim of this defendant are not sufficient to raise an issue. Under the view taken, however, the question of indebtedness between Mrs. Mosherosh and this defendant becomes immaterial, except the mere fact that an indebtedness did exist between them with reference to this note, and this fact is undisputed. It is further undisputed that at the time Mrs. Mueller, the plaintiff, purchased this property, there was a valid, subsisting and recorded lien thereon. It is further undisputed that the defendant in this action did recover a default judgment against Mrs. Mosherosh on this note, and that this judgment has not been paid.

There are two questions presented by these appeals: (1) Was this mortgage a valid, subsisting lien on the property described in the complaint at the time of the commencement of this action? (2) Was the conveyance from Mrs. Mosherosh to the plaintiff herein a *bona fide* transaction, so as to pass the title of the property to this plaintiff?

1. A mortgage itself does not create or alienate an estate in real property, but is a mere security for the payment of a debt or the discharge of an obligation. (Section 3810 *et seq.*, Civil Code; *Hull v. Diehl*, 21 Mont. 71, 52 Pac. 782; *Gallatin County v. Beattie*, 3 Mont. 173; *Holland v. Board of County Commis-*

sioners, 15 Mont. 460, 39 Pac. 575, 27 L. R. A. 797; *Wilson v. Pickering*, 28 Mont. 435, 72 Pac. 821; *Swain v. McMillan*, 30 Mont. 433, 76 Pac. 943; *Adler v. Sargent*, 109 Cal. 42, 41 Pac. 799; *Mott v. Clark*, 9 Pa. St. 399, 49 Am. Dec. 566; *State ex rel. Cruse Savings Bank v. Gilliam*, 18 Mont. 100, 44 Pac. 394, 45 Pac. 661, 33 L. R. A. 556.)

It is true, a mortgage is a conveyance (Section 1642, Civil Code), but it is a conveyance of only a chattel interest (*Hull v. Diehl, supra.*)

A mortgage being a mere lien executed for the benefit of the mortgagee, it may be canceled or released by him at any time with or without consideration, and with or without the consent of the mortgagor. (See *Swain v. McMillan*, above.) Nor does the purchaser of mortgaged real estate become thereby personally liable for the payment of the indebtedness described in the mortgage. (Sections 3752, 3790, 3817, Civil Code.) The lien is strictly *in rem* by reason of the mortgage, and, when the mortgage is released, a *bona fide* purchaser holds the *res* free of such claim or lien, whether the purchase was made prior or subsequent to such release.

In this state a mortgage may be discharged by entry in the margin of the record thereof. (Section 3845, Civil Code.) The release in this case was made in that manner, and is in the following form: "I hereby certify and declare that the mortgage, together with the debt thereby secured, is fully paid, satisfied and discharged. Witness my hand this 8th day of June, 1898. George Renkes. Attest, John Weston, County Recorder, by A. E. Whipps, Deputy." The defendant, in attacking this release, assumed the burden of showing the existence of facts sufficient to warrant a court of equity in setting it aside. (Section 2170, Civil Code.) The evidence clearly shows that neither Mrs. Mosherosh, the mortgagor, nor Mrs. Mueller, the plaintiff herein, knew of the intention of appellant to release this mortgage, and did not know for some time afterwards that he had done so. The defendant says: "I came to the courthouse alone,

voluntarily, without conferring with any one about it, with the intention of canceling this mortgage and going over to Mrs. Mosherosh, which I did, and getting new papers made out. I did not think I was making a mistake. \* \* \* No consideration in the way of money passed between myself and Mrs. Mosherosh for the cancellation of the mortgage." No claim can therefore be made that the release is the result of any deception on the part of Mrs. Mosherosh or of Mrs. Mueller. The appellant, Renkes, claims that he "did not know what he was doing" when he made the release, and "did not know the effect of his act," and that the same was without consideration. The defendant testified that in a conversation both the plaintiff and Mrs. Mosherosh tentatively stated to defendant that they would give him a new mortgage, but they did not say when they would do it, and that Mrs. Mosherosh told him that this mortgage was good for ten years, but that he disbelieved it. Mrs. Mosherosh denies that she ever promised to execute a new mortgage, and testified that she informed defendant that she was no longer the owner of the property.

The deed from Mrs. Mosherosh to Mrs. Mueller was executed May 6, 1896, and was recorded on that day. Several months after the defendant had executed the release, and after he had been fully informed as to its effect and import, he instituted an action at law on this note against Mrs. Mosherosh, to which action the plaintiff herein was not a party, "filed in said action an affidavit and undertaking on attachment, and thereupon caused a summons and writ of attachment to be issued in said cause," and attached this same property as the property of Mrs. Mosherosh. Why the defendant thought necessary to attach the property if he believed that he had a mortgage on it is not explained. Under the Code, before a party is entitled to a writ of attachment he must make an affidavit stating, among other things, the amount of his claim, "and that the payment of the same has not been secured by any mortgage or lien upon real or personal property, or any pledge of personal property, or, if originally so secured, that such security has, without any act of the plaintiff,

or the person to whom the security was given, become valueless." (Sections 890, 891, Code of Civil Procedure.) Whether the defendant was legally entitled to any attachment at all in his action against Mrs. Mosherosh is a question which does not arise in this case. It is apparent, however, that if this mortgage was a valid, subsisting lien for the security of this note on December 20, 1898, when defendant instituted his action against Mrs. Mosherosh, then the statement in the affidavit for attachment, "the payment of the same is not secured," was untrue, and, if this statement was true, the mortgage did not exist at that time. If it did not exist at that time, it does not exist now, for it has never been reinstated nor the release set aside.

No case has been cited, nor have we been able to find any, approximately similar to this in its statement of facts. The following cases, however, discuss the main question: *United States v. King*, 9 Mont. 75, 22 Pac. 498; *Stephenson v. Hawkins*, 67 Cal. 106, 7 Pac. 198; *Garwood v. Eldridge*, 2 N. J. Eq. 145, 34 Am. Dec. 195; *Dix v. Smith*, (Okl.) 50 L. R. A. 714, and note; *Attkisson v. Plumb*, (W. Va.) 58 L. R. A. 788, and note.

When the defendant ascertained his mistake in making the release, he had his option to institute an action in equity against all interested parties to set aside the release and to foreclose the mortgage, or to sue in an action at law on the note. He chose the latter course, and, to secure the benefit of an attachment, made and filed an affidavit to the effect that he had no mortgage.

The trial court did not err in holding that this mortgage was not a lien on the property described in the complaint at the time this action was commenced.

2. The *bona fides* of a conveyance presents questions of fact which must be determined from the particular acts of the parties, and the circumstances and conditions surrounding the transaction and under which they act. Mere inadequacy of consideration is not of itself sufficient cause to invalidate a conveyance, except, perhaps, in extreme cases. (*Maloy v. Berkin*, 11 Mont.

138, 27 Pac. 442.) Nor is the mere fact that the transaction is between mother and daughter sufficient evidence to stamp it with fraud. It is true this court has decided that where a husband, then being in debt, transfers property to his wife, courts of equity will scrutinize the transaction very closely (*Lambrecht v. Patten*, 15 Mont. 260, 38 Pac. 1063; *Shepherd v. First National Bank*, 16 Mont. 24, 40 Pac. 67); and it is an equitable rule that, where fraud is charged, the entire transaction should be closely examined.

The evidence in this cause shows conclusively that on the 6th day of May, 1896, Mrs. Mosherosh, the grantor of the plaintiff herein, was indebted to the plaintiff in certain sums which had theretofore been advanced to her; that she was also at that time indebted to the defendant herein, Mr. Renkes; that Mr. Renkes' claim was secured by a mortgage on real estate, which mortgage was then duly recorded. The consideration named in the deed from Mrs. Mosherosh to this plaintiff was \$1. The deed was a bargain and sale deed. The testimony, however, shows conclusively that the consideration was \$2,100; that somewhere between \$800 and \$1,200 were paid to Mrs. Mosherosh on the day the deed was executed. The balance of the consideration had been theretofore advanced. The mortgage of defendant, then being of record, was prior to this deed, and no conveyance which Mrs. Mosherosh could make could in any manner defraud this defendant or invalidate his lien. This lien continued for more than two years after this conveyance to plaintiff had been recorded, and was then released only by the voluntary act of the defendant himself; nor was any suit ever instituted by the defendant to foreclose that mortgage or to set aside this release. We are unable to understand from this state of facts how Mrs. Mosherosh, at the time she made this conveyance to her mother, could have intended to defraud this defendant, for it was beyond her power to invalidate the lien of the defendant, or to make any conveyance of the property that would be prior to this mortgage.

We think the judgment and orders appealed from should be affirmed.

PER CURIAM.—For the reasons stated in the foregoing opinion, the judgment and orders are affirmed.

MR. CHIEF JUSTICE BRANTLY, not having heard the argument, takes no part in this decision.

Rehearing denied.

MAHONEY, RESPONDENT, v. DIXON ET AL., APPELLANTS.

(No. 1,908.)

(Submitted May 28, 1904. Decided July 8, 1904.)

*Notaries—False Certificates — Actions for Damages—Proximate Cause—Questions for Jury—Burden of Proof—Appeal from Judgment—Statement Used on Motion for New Trial.*

- 1 Under Code of Civil Procedure, Section 1736, on an appeal from a final judgment, it will be presumed, in the absence of a showing to the contrary, that a statement disclosed by the record before the supreme court as prepared, settled and filed according to law was actually used upon the motion for a new trial, where it also appears that a decision on the motion was made.
- 2 Under Code of Civil Procedure, Section 1736, on an appeal from a final judgment any question of law which is raised in the statement, if otherwise properly presented, will be considered and passed on by the supreme court; and thus, while it cannot consider the question of the insufficiency of the evidence to support the verdict or decision, it can determine the question of law as to whether there is any evidence to support such verdict or decision.
- 3 There can be no recovery in damages against a notary for falsely certifying to an acknowledgment unless the person seeking such recovery relied upon the statements contained in the notary's certificate, so that the damages to him were proximately caused by the notary's wrongful act.
- 4 In an action against a notary for falsely certifying to an acknowledgment of a mortgage, on the security represented by which plaintiff advanced money, the measure of damages was the value of the security which plaintiff would have received, had the mortgage been valid, not exceeding the amount loaned by plaintiff, and not the value of the property described in the mortgage.
- 5 In an action against a notary for falsely certifying to an acknowledgment of a mortgage, on the security represented by which plaintiff advanced a loan, the burden was on plaintiff to show the value of the security which he would have received had the mortgage been valid.

31	107
81	258
33	274
31	107
334	458

*Appeal from District Court, Silver Bow County; William Clancy, Judge.*

ACTION by Edward L. Mahoney against John M. Dixon and others. From a judgment for plaintiff, defendants appeal. Reversed.

#### STATEMENT OF THE CASE.

There was an appeal to this court from the judgment entered in favor of the plaintiff in the lower court, and also an appeal from the order denying defendant's motion for new trial. Heretofore the appeal from the order denying a new trial was dismissed.

There is no controversy as to the existence of the following facts:

That the defendant Dixon was a duly appointed, qualified and acting notary public in Silver Bow County; that the defendants Leonard and McDermott were the sureties on his official bond; that on the 10th day of January, 1900, one A. E. Reek introduced to Dixon a certain person as Andrew Nelson, who in that name had executed a mortgage on certain real estate situated in Butte, and who desired to acknowledge the execution of the same, and have his acknowledgment certified so as to entitle the mortgage to record; that Dixon took the acknowledgment, and attached to the mortgage his certificate as follows:

"State of Montana, County of Silver Bow—ss.: On this 10th day of January, 1900, before me, Jno. M. Dixon, a notary public in and for the county of Silver Bow, State of Montana, personally appeared Andrew Nelson, known to me to be the person described in, and who executed the foregoing instrument, and who severally acknowledged to me that he executed the same.

"In testimony whereof I have hereunto subscribed my hand and affixed my notarial seal on the day and year in this certificate above written.



"Jno. M. Dixon, Notary Public in and for Silver Bow county, Montana. [Notarial Seal.]"

That, as a matter of fact, Nelson was not personally known to Dixon, and no other steps were taken by Dixon to establish the identity of the person whose acknowledgment he took and certified. Plaintiff alleges that the facts stated in the notary's certificate are false and fraudulent; that in fact Nelson never appeared before the notary at all; that the signature "Andrew Nelson" to the mortgage was forged by some one who impersonated Nelson; that the plaintiff relied on the truth of the facts certified by the notary, and was thereby damaged in the sum of \$1,800, which amount plaintiff had loaned on the security purporting to be represented by the spurious mortgage. These allegations are put in issue by the answer. The other allegations in the pleadings are not necessary to be considered.

Among others, the court gave instructions numbered 6 and 8, as follows:

"Instruction No. 6. The statute required that a notary shall state in his certificate that the person acknowledging was personally known to him to be the person subscribing the instrument. The plaintiff avers that Dixon made the statement required by the statute in his certificate, but that the same was false and fraudulent. If you find from the evidence that this is the fact, then, in the performance of an official act done by him as notary public, he violated an express provision of the statute, according to the case stated in the complaint. He and his sureties are therefore liable for the damage suffered by the plaintiff."

"Instruction No. 8. The jury are further instructed that the damage occasioned to the plaintiff by reason of the false certificate set forth and declared in plaintiff's complaint is the value of the property that would have been conveyed as security, provided the said note and mortgage had been valid; and not forged, up to the amount of the sum specified as the penalty of said bond; and if you believe from the evidence that the value of the property described in the complaint as lot 5 in block 3 of the

Thornton Addition to the Butte Townsite was more than one thousand dollars (\$1,000), then you are instructed that the amount of your verdict should be for the full sum of the one thousand dollars (\$1,000) specified in said bond."

*Mr. L. P. Forrestell, Mr. W. M. Bickford, Mr. L. O. Evans, and Mr. R. S. Alley, for Appellants.*

*Mr. John J. McHatton, Mr. George F. Shelton, and Mr. T. J. Walker, for Respondent.*

The theory of plaintiff's case is that a notary is liable for official misconduct or negligence, and especially where the law provides, as our statute does, that he may, as to a person who is not known to him, have the identity of such person proven by satisfactory evidence. (Civil Code, Sec. 1605.) In this case, Dixon, in violation of that statute and in violation of his official duty, certified that he personally knew Connors to be Nelson, the owner of the property. This fact is admitted by the pleadings in this case.

For official misconduct or neglect of a notary public, he and the sureties on his official bond are liable to the parties thereby injured for all damages sustained. (Political Code, Sec. 919; 16 Am. and Eng. Ency. of Law 1st Ed., 779; *Heidt v. Minor et al.*, 89 Cal. 115, 26 Pac. 627; *Oakland Bank v. Murfey et al.*, 68 Cal. 455.)

The condition, "well and truly to perform and discharge the duties of a notary public according to law," embraces every act which he is authorized or required by law to do in virtue of his office. (*Fogarty v. Finley*, 10 Cal. 239-245.)

A notary who attaches his signature and seal to a certificate, without examining it to determine that the facts certified are true, can scarcely be said to faithfully perform his duties. (*Fogarty v. Finley*, 10 Cal. 239-245; *Curtis v. Colby*, 39 Mich. 456; *People v. Bartels*, 138 Ill. 330, 27 N. E. 1091.)

Where a notary certifies to personal knowledge of a grantor, and the party is a stranger to him, he does so at his peril. (16

Am. and Eng. Ency. of Law, 1st Ed., 781; *State v. Meyer*, 2 Mo. App. 413; *Curtis v. Colby*, 39 Mich. 456; *People v. Bartels*, 138 Ill. 330, 27 N. E. 1091; *Fogarty v. Finley*, 10 Cal. 239-245.)

Taking an acknowledgment is a ministerial act. (*Horbach v. Tyrrell*, 48 Neb. 514, 37 L. R. A. 434; *Harris v. Hanson*, 11 Me. 245; *Knowlton v. Bartlett*, 1 Pick. 274; *Horan v. People*, 10 Ill. App. 23; *Curtis v. Colby*, 39 Mich. 456; *Doran v. Butler*, 74 Mich. 643, 42 N. W. 273; *Fogarty v. Finley*, 10 Cal. 239; *Mechem*, Pub. Off., Secs. 706-709; *Livingston v. Kettelle*, 1 Gilman, 116, 41 Am. Dec. 166, 175.)

The complaint in this action states a cause of action against Dixon and his bondsment and is sufficient to entitle plaintiff to recover and to sustain the judgment in this action. (*People v. Bartels*, 138 Ill. 330, 27 N. E. 1091.)

Dixon and his bondsmen, or the sureties on his official bond, may be sued together. (Code of Civil Procedure, Sec. 585; *Cole Mfg. Co. v. Morton*, 24 Mont. 58; *Rodini v. Lytle*, 17 Mont. 448.)

Contributory negligence is a matter of defense, and the plaintiff need not allege or prove its absence. (*Higley v. Gilmer*, 3 Mont. 90, 96; *Nelson v. City of Helena*, 16 Mont. 21, 22; *Prosser v. Montana Central Ry. Co.*, 17 Mont. 372, 380; *Mulville v. Pac. Mut. Life Ins. Co.*, 19 Mont. 95, 100.)

Contributory negligence, when properly pleaded, is a question of fact, to be determined by the jury upon the facts of each particular case. (*Wall v. Helena St. Ry. Co.*, 12 Mont. 44, 50; *Kelley v. Fourth of July Min. Co.*, 16 Mont. 484, 503; *Cannon v. Lewis*, 18 Mont. 402, 406.)

The law presumes damage from the breach of official duty. (*Laflin v. Willard*, 16 Pick. 64, 26 Am. Dec. 629.)

It is a well established rule in this court that where there is a substantial conflict of evidence the findings of the court or jury will not be disturbed. (*Leonard v. Shatzer*, 11 Mont. 422, 428; *Bateman v. Raymond*, 15 Mont. 439, 442; *Maddox v. Teague*, 18 Mont. 512, 522.)

Defendants, having introduced evidence after the ruling denying their motion for a nonsuit, waived the same and waived the right to complain of any error on the part of the court in overruling said motion. (*Alderson v. Marshall*, 7 Mont. 288; *T. C. Power & Bro. v. Stocking*, 26 Mont. 478, 482.)

The rule is well established that in considering alleged error in an instruction the instructions should be taken together as a whole. (*State v. Rolla*, 21 Mont. 582, 587; *Cannon v. Lewis*, 18 Mont. 402, 408.)

While the law provides that a statement on motion for a new trial may be used on appeal from a final judgment, such statement cannot be used for the purpose of determining the sufficiency or weight of the evidence to sustain the decision of the court or verdict of the jury, since such questions could only be reviewed on appeal from an order granting or denying the motion. (Code of Civil Procedure, Sec. 1736; *Withers v. Kemper*, 25 Mont. 432; *Wyman v. Jensen*, 26 Mont. 227, 240.)

MR. JUSTICE HOLLOWAY, after stating the case, delivered the opinion of the court.

A question of practice is presented by respondent's motion to strike from the files and disregard the statement on motion for new trial. It is contended that, as the appeal from the order overruling the motion for new trial has been dismissed, there is now properly before this court for consideration only the judgment roll. The question presented calls for a construction of Section 1736 of the Code of Civil Procedure, which reads as follows: "Sec. 1736. On an appeal from a final judgment, the appellant must furnish the court with a copy of the notice of appeal, of the judgment roll, and of any bill of exceptions or statement in the case, upon which the appellant relies. Any statement used on motion for a new trial may be used on appeal from a final judgment equally as upon appeal from the order granting or refusing a new trial."

Notwithstanding the statute provides that any statement used on motion for a new trial may be used on appeal from the final judgment, it has wholly failed to provide any means by which it may be ascertained that a particular statement was so used, for the order disposing of the motion for a new trial is not a part of the statement itself, and there is no statute which requires the district court, in any event, in such order, to specify the papers which were used. A statute similar to Section 1736, above, has long been in force in California, and has been considered by the supreme court of that state a number of times. Spelling, in his work on New Trials and Appellate Practice, after carefully reviewing all these decisions, reaches this conclusion: That if the record before the supreme court discloses a statement prepared, settled and filed according to law, and it is made to appear that a decision on the motion was made, it will be presumed, in the absence of any showing to the contrary, that such statement was actually used upon such motion. (2 Spelling on New Trials and App. Practice, Sec. 423.) We are disposed to accept the conclusion reached above, and adopt the practice therein indicated. The extent of the use which may be had of such statement on an appeal from the final judgment was determined, in *Whalen v. Harrison*, 26 Mont. 316, 67 Pac. 934, to be for all purposes for which a bill of exceptions may be properly used. In other words, any question of law which may be raised in the statement, if otherwise properly presented, will be considered and passed upon by the supreme court. While we cannot consider the question of the insufficiency of the evidence to support the verdict or other decision, we can determine the question of law suggested by the inquiry, is there any evidence to support it?

Instruction No. 6, above, given by the court, is indefinite. The jury should have been made to understand that it is only for damages proximately caused by the wrongful act of defendant Dixon that the plaintiff may recover. If, in fact, the plaintiff did not rely upon the statements contained in the notary's certificate, then the mere fact of the notary's violation of

his official duty could not have been the proximate cause of plaintiff's injury. It was necessary for the plaintiff to allege, as he did, that he did rely upon such certificate, but this allegation is put in issue by the answer. It was therefore, necessary to be supported by the proof, and considered and passed upon by the jury. Upon a retrial of this cause, this instruction may be modified in the particular indicated.

Instruction No. 8, above, is wrong. It submitted to the jury an entirely erroneous standard by which the jury might determine the measure of plaintiff's damages. By it the jury was told that the measure of such damages is the value of the property described in the spurious mortgage, not exceeding the amount of the notary's official bond. A simple illustration will show the absurdity of this position. Assuming that the property was of the value of \$4,500, and that there were prior mortgages or liens upon the property to the amount of \$4,000, in that event the utmost extent of plaintiff's loss would be \$500, for that would be the full value of the security which he would have had for his loan, had the mortgage been genuine. Therefore the value of the property is not necessarily the criterion for determining the measure of damages. On the contrary, the measure of damages in this instance is the value of the security which the plaintiff would have received, had the mortgage been valid, not exceeding the amount loaned by plaintiff, and the burden of proof was upon the plaintiff to show such value.

We have examined the other assignments of error which are properly before us, but find no merit in them.

The motion to strike the statement on motion for new trial from the files is overruled, and the judgment is reversed, and the cause remanded for new trial.

*Reversed and remanded.*

Rehearing denied September 28, 1904.

## QUINLAN, RESPONDENT, v. CALVERT, APPELLANT.

(No. 1,924.)

(Submitted June 16, 1904. Decided July 8, 1904.)

*Trial by Court—Findings — Sufficiency—Implied Findings—  
Request for Findings—Water Rights.*

1. A party litigant is entitled to a specific finding on each material issue, but he cannot be heard to complain where no finding is made unless he has complied with the statute in requesting the same.
2. Where the court stated that it would make findings of fact, defendant was relieved from making any request for findings, and the submission of written findings had the effect of requesting findings in writing on the material facts involved.
3. Where affirmative matter is set up in the answer, no finding can be implied as to such independent issue, where a specific finding was requested thereon.
4. Where affirmative matter is set out in the answer, and a request made for a finding thereon, a finding that all the material allegations of the complaint are true, and directing that judgment be entered for plaintiff, is insufficient.
5. The mere fact that water has its source on land owned by a person does not of itself necessarily give him the exclusive right thereto, so as to prevent others from acquiring rights therein under the laws of this state.

*Appeal from District Court, Deer Lodge County; Welling Napton, Judge.*

ACTION by Harry J. Quinlan against Ed. Calvert. From a judgment for plaintiff, and an order overruling his motion for a new trial, defendant appeals. Reversed.

*Mr. H. R. Whitehill*, for Appellant.

*Mr. W. H. Trippet*, and *Mr. J. H. Duffy*, for Respondent.

MR. COMMISSIONER POORMAN prepared the following opinion for the court:

In this action plaintiff seeks to obtain a perpetual injunction restraining the defendant from interfering with a ditch constructed by plaintiff for the purpose of draining marsh lands owned by plaintiff. The trial was by the court sitting without a jury, and judgment was entered in accordance with the prayer

of the complaint. From this judgment, and from an order overruling defendant's motion for a new trial, defendant appeals.

Much of the evidence appearing in the record is indefinite, for the reason that witnesses continually made use of the terms "here" or "there," as though indicating on a map or plat; but the maps put in evidence contain no marks, nor does the evidence contain any statement, by which the particular locations meant by the witnesses in the use of these terms can be ascertained. It sufficiently appears, however, from the pleadings and the evidence, that the plaintiff is the owner of certain lands, a part of which is rendered marshy by water coming to the surface; that this water drains into Dry Modesty creek, the channel of which extends in a northeasterly direction; that the ditch or drain constructed by plaintiff extends in a southeasterly direction, and has the effect of preventing the water flowing from this marshy land from entering the Dry Modesty channel, except to cross the same in plaintiff's ditch. Many of the material allegations of the complaint are denied by the answer, and defendant sets up an affirmative defense to the effect that the waters from this land formed a running stream which flowed into Dry Modesty channel; that defendant had made location thereof, and was using the same in irrigating lands which it is admitted defendant owned. "At the close of the evidence, and after the same had been argued by counsel, the court stated that it would make findings of fact, and ten days \* \* \* were granted by the court to defendant to submit in writing his findings, and which [order] was entered in the minutes of the court. That thereafter, \* \* \* before any findings were made by the court, and before judgment was rendered thereon, defendant submitted certain findings in writing on the questions embraced in the pleadings in said action, to the court to find thereon; the said finding so presented to the court [being] as follows." The findings are then set out in full in the record. Some of these findings submitted were on material issues. The court considered these findings submitted, acted thereon, and refused the same, and defendant excepted.



It is claimed by respondent that appellant did not "request findings in writing and have such request entered in the minutes of the court," as required by Section 1114 of the Code of Civil Procedure. But it does appear "that the court stated that it would make findings of fact."

The defendant had the right, in view of this statement, to presume that the court would make findings on all the material issues, and was thereby relieved from making any request for findings at all. Furthermore, it appears that the court gave the defendant ten days "to submit in writing his findings"—not request for findings, but the findings themselves, which he desired the court to make. The court was not bound by either the form or the substance of the findings submitted, but the submission of written findings, under such circumstances, had the effect of requesting "findings in writing" on the material facts involved therein, and the findings submitted show the particular point or issue upon which the defendant required a finding. The exception taken therefore complies with Section 1115, Code of Civil Procedure.

In the record appears this entry:

"Findings and Conclusions of Law by the Court.

"Conclusions of Law.

"The court finds all the material allegations of plaintiff's complaint are true.

"Findings.

"Let judgment be entered for the plaintiff according to the prayer of his complaint."

This is dated and signed by the judge.

The first statement is not a conclusion of law, but a general finding of fact, as the same appears in the allegations of the complaint. The second statement is neither a finding of fact nor a conclusion of law, but an order that judgment be entered for the plaintiff. A general finding of facts in this form was held sufficient in *County of Sutter v. McGriff*, 130 Cal. 124, 62 Pac. 412, but the reasons for the decision are not stated in

the opinion. A general finding was also held sufficient in *Bitter v. Moaut Lumber, etc. Co.*, 10 Colo. App. 307, 51 Pac. 519, but in this latter case no answer had been filed, and the facts were not in dispute. In *Moore v. Clear Lake Waterworks*, 68 Cal. 146, 8 Pac. 816, a finding to the effect that all the allegations of the complaint are true, and the allegations of the answer are untrue, was held sufficient.

This form of finding, however, could not be sustained in this case, for some of the affirmative allegations of the answer were admitted by the replication.

If the doctrine of implied findings in force in this state (*Gallagher v. Cornelius*, 23 Mont. 27, 57 Pac. 447), can be invoked in aid of the general finding herein, such implied finding can go no further than that all the allegations of the answer inconsistent with the allegations of the complaint and not admitted in the reply are untrue. The general finding made by the court, by its terms, applies only to the allegations of the complaint. The affirmative matter set up in the answer is not included therein, and no finding can be implied as to an independent issue raised for the first time in the answer, where a specific finding was requested thereon. (*Estill v. Irvine*, 10 Mont. 509, 26 Pac. 1005.)

This brings this case directly in conflict with the decision in *Krug v. Lux Brewery Co.*, 129 Cal. 322, 61 Pac. 1125, and cases cited.

The doctrine of implied findings is not followed in California, but where the statute requires findings to be made the principle is the same. Section 1111, Code of Civil Procedure, requires findings to be given in writing and filed with the clerk. Section 1112 of the same Code requires the court to state (a) the facts found; (b) the conclusions of law; and (c) to order judgment entered thereon. The same Code also specifies the circumstances under which the findings of fact may be waived: (1) By failing to appear at the trial; (2) by consent in writing filed with the clerk; (3) by oral consent in open court, entered in the min-

utes (Section 1113); (4) by an agreed statement of facts (Section 1117); (5) in case of judgment by default (Section 1020). This case does not fall within any of these enumerations. The evident meaning of the statute is that a party litigant is entitled to a specific finding on each material issue, but that he cannot be heard to complain where no finding is made unless he has complied with the statute in requesting the same.

Very material issues were presented by these pleadings. The mere fact that this water has its source on land now owned by plaintiff does not of itself necessarily give him the exclusive right thereto, so as to prevent others from acquiring rights therein under the laws of this state. (Section 1239, 5th Div. Comp. St. 1887; Section 1880, Civil Code; Session Laws 1901, p. 152; *Murray v. Tingley*, 20 Mont. 260, 50 Pac. 723.)

A discussion of the general principles involved may be found in the following cases, and the notes thereto: *Willow Creek Irrigation Co. v. Michaelson*, 21 Utah, 248, 60 Pac. 943, 51 L. R. A. 280, 81 Am. St. Rep. 687; *Southern Pac. R. Co. v. Du-four*, 95 Cal. 615, 30 Pac. 783, 19 L. R. A. 92; *Gray v. McWilliams*, 98 Cal. 157, 32 Pac. 976, 21 L. R. A. 593, 35 Am. St. Rep. 163; *Sullivan v. Northern Spy M. Co.*, 11 Utah, 438, 40 Pac. 709, 30 L. R. A. 186; *Cairo, etc. R. Co. v. Brevort*, (C. C.) 25 L. R. A. 527, 62 Fed. 129; *Jose Maria De Necochea v. Curtis*, 80 Cal. 397, 20 Pac. 563, 22 Pac. 198; *Ely v. Ferguson*, 91 Cal. 187, 27 Pac. 587.

The maxim of jurisprudence announced in Section 4605 of the Civil Code, that "one must so use his own rights as not to infringe upon the rights of another," is a principle of substantive law, peculiarly applicable to equity actions, and is not to be entirely overlooked in passing upon the relative rights of parties in suits of this character, provided the facts appearing, in the judgment of the court, make the principle applicable.

For the failure of the court to make proper findings in this case, we think the judgment and order should be reversed.

PER CURIAM.—For the reasons stated in the foregoing opin-

ion, the judgment and order are reversed, and the cause is remanded for a new trial.

Mr. JUSTICE MILBURN, not having heard the argument, takes no part in this decision.

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SPENCER, RESPONDENT, v. HERSAM ET AL., APPELLANTS.

(No. 1,930.)

(Submitted June 17, 1904. Decided July 8, 1904.)

*Vendor and Purchaser—Contract—Rescission—Fraud—Complaint—Equity—New Trial—Notice—Service—Time.*

1. In an action to rescind a sale of real estate for fraud, an allegation that plaintiff relied on the representations made constituted a sufficient averment that he believed them to be true.
2. In an equity case, it is essential to the validity of a motion for a new trial that the notice of intention be filed within ten days after notice of the decision of the court.

*Appeal from District Court, Silver Bow County; William Clancy, Judge.*

ACTION by John B. Spencer against M. E. Hersam and others. From a judgment in favor of plaintiff, and from an order denying a new trial, defendants appeal. Affirmed.

*Mr. M. P. Gilchrist*, for Appellants.

*Mr. C. M. Parr*, for Respondent.

MR. COMMISSIONER CALLAWAY prepared the following opinion for the court:

This action was brought by the plaintiff, the vendor, for the purpose of procuring the rescission of a sale of real estate on the ground of fraud practiced upon him by the defendants, the

vendees. The appeal has been taken by the defendants from a judgment against them, and from an order denying their motion for a new trial.

1. The decisive question in the case is, does the complaint state a cause of action? Counsel for the respective parties do not agree as to whether it does, under the rule announced in *Butte Hardware Co. v. Knox*, 28 Mont. 111, 72 Pac. 301.

Without entering into a detailed discussion of the facts alleged, we may say that the complaint, in effect, states that certain representations, which plaintiff had a right to rely upon, were made to him by and at the instance of the defendants; that the representations were untrue, and therefore false; that plaintiff relied upon such representations, and was induced thereby to enter into the contract, and as a result thereof he suffered loss. There is no direct allegation that plaintiff believed the representations to be true, but from the facts alleged in the pleading the conclusion that he did is inevitable. The words "rely" and "believe" are nearly synonymous. "Rely" is to depend on some one or something as worthy of confidence; to repose confidence; to trust; used with "on" or "upon." "Believe" is to accept as true on the testimony or authority of others; to have faith or confidence in the truth of any one or anything. (See *Standard and Century Dictionaries*.) And one is impelled to inquire, will a man rely upon a statement of fact which he knows to be untrue? If he relies upon a statement of fact, does it not necessarily follow that he believes such statement? As a matter of law, a man may not rely upon that which he knows to be false. The complaint is inartistically drawn, and is not to be recommended as a form, but it contains the necessary substance to sustain the judgment.

2. This action was tried to a jury, which returned a verdict and sepical findings on February 6, 1902. On February 10, 1902, defendants served and filed their notice of intention to move for a new trial. The court adopted the findings and entered its decree on March 22, 1902. In an equity case, one in-

tending to move for a new trial must, within ten days after notice of the decision of the court, file with the clerk and serve upon the adverse party a notice of his intention, designating the grounds upon which the motion will be made. If the judge, as chancellor, sees fit to employ the services of a jury to enlighten his conscience, its findings are merely advisory, and it is immaterial when they are returned into court. The decision of the court is made when it adopts or rejects the findings of the jury, or makes its own findings, and directs its judgment. (*Power v. Lenoir*, 22 Mont. 169, 56 Pac. 106.) It was essential to the validity of their motion for a new trial that the defendants serve and file their notice of intention within ten days after notice of the decision of the court. This they did not do. Therefore the court was obliged to overrule the motion.

It follows that the judgment and order should be affirmed.

PER CURIAM.—For the reasons given in the foregoing opinion, the judgment and order are affirmed.

MR. JUSTICE MILBURN, not having heard the argument, takes no part in this decision.

Rehearing denied September 29, 1904.

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BOTTEGO, APPELLANT, v. CARROLL ET AL., RESPONDENTS.

(No. 1,928.)

(Submitted June 16, 1904. Decided July 8, 1904.)

*Money Paid—Mistake of Law—Recovery—Variance.*

Civil Code, Section 2123, provides that a court of equity will relieve against a mistake of law when it arises (1) from a misapprehension of the law by all parties by supposing that they knew or understood it, and by making substantially the same mistake, or (2) a misapprehension of the law by one

party of which the others are aware at the time of contracting, but which they do not rectify. *Held*, that where plaintiff brought suit under the second subdivision to recover an overpayment made on a repurchase of property sold under foreclosure, and alleged that she made the payment under misapprehension as to her legal right to redeem, and that the payment was caused to be made through the fraud, conspiracy and deceitful practices of the defendants, but the proof showed that whether plaintiff had a right of redemption at the time was a mooted question of law, and that defendants acted in good faith in their contention that her right of redemption was barred, there was a fatal variance.

*Appeal from District Court, Silver Bow County; E. W. Harney, Judge.*

ACTION by Mary H. Bottego against Michael Carroll and another. From a judgment of nonsuit, and from an order denying her motion for a new trial, plaintiff appeals. Affirmed.

*Mr. C. M. Parr*, for Appellant.

We do not question the right of a mortgagor to include in a mortgage a power of sale; that is settled. But our contention is, that if one attempts to sell his right of redemption, it must be by a separate contract from the mortgage itself, and must be for a consideration, the same as any other contract. (*Pough v. Davis*, 96 U. S. 332.)

Under Section 3751, Civil Code, one cannot, even though he so desire, waive his right of redemption, and this leads us up to the proposition of fraud and the facts to be set out in support thereof. Misrepresentation of the law by one party upon which the other ignorantly relies is fraud, and no voluntary payment. (*Coke v. Nathan*, 16 Barb. 342; 2 Pom. Eq. Jur. Secs. 841-846-847.)

"Every transfer of an interest in property, other than in trust, made only as a security for the performance of another act, is to be deemed a mortgage, except when in the case of personal property it is accompanied by actual change of possession, in which case it is deemed a pledge." (Section 3813, Civil Code.) "A mortgage may foreclose the right of redemption of the mortgagor in the manner prescribed by the Code of Civil Procedure."

(Section 3820, Civil Code.) Thus we see under our Code the loan in this case was secured by a mortgage, and no trust deed whatever existed as in the case of the *First National Bank of Butte v. Bell Silver & Copper Mining Co.*, 8 Mont. p. 32; and notwithstanding that decision, which was carried up to the Supreme Court of the United States, and affirmed in 156 U. S. 470, I still contend that where the mortgagee or his agent was the purchaser at a sale under the provisions of sale in a like mortgage, the right of redemption is not cut off. (*Buham v. Shaffer*, 2 Cal. 387; *Payne v. Bensley*, 8 Cal. 267, 68 Am. Dec. 320; *Moore v. Titman*, 44 Ill. 370, 21 Am. St. Rep. 246; *Thornton v. Irvin*, 43 Mo. 167; *Very v. Russell*, 65 N. H. 649.) In fact all the authorities hold the mortgagee a trustee for the mortgagor. The equity of redemption upon purchase by the mortgagee still attaches to the property in favor of the mortgagor. (Authorities *supra*—especially 2 Cal. 387.) The power of sale in a mortgage is merely a cumulative remedy. (*Cormerais v. Genell*, 22 Cal. 116.)

In conclusion, the Compiled Statutes of Montana, 1887, does not have such a provision as Section 3751, Civil Code, providing "and all contracts in restraint of the right of redemption from a lien are void," and the decision in *Bank v. Bell* only decided that under the statute a sale was good, if sold under the power of sale. But the same decision (8 Mont. p. 32) reads, "Nor is there anything to prevent a power of sale." That is more than a mortgage, and does not come within the definition. We see nothing in the Code (1887) to limit the power of contracting as is contended. Now, taking that opinion of our supreme court which says there is nothing in the Code (1887) to limit the power of contracting, and apply the language to our present Code (1895), Section 4751, Civil Code, and we find that the Code governs in this case and not the decision of *First National Bank v. Bell*, *supra*, for that section expressly prohibits the contracting against the right to redeem.

Mr. John W. Stanton. for Respondents.



Unless plaintiff had an equity of redemption and the right to redeem from Morgan, she has no standing in court, and even though she had an equity of redemption, the question might still be raised whether she ought to prevail and be allowed to take advantage of her own conduct in dealing with Morgan and in buying the property from him, treating him as owner, and obtaining deed from him, with the view of suing him as soon as she closed the deal and obtained deed from him. However, we prefer to treat the case as raising the sole question as to whether she had the right of redemption or not. There can not possibly be any other question in the case. This question has been adjudicated in this court in the case of *First National Bank of Butte v. Bell Silver & Copper Mining Co.*, 8 Mont. 32. That case was appealed to the Supreme Court of the United States, and the decision of our court was affirmed. (*Bell v. Bank*, 156 U. S. 470, 39 L. Ed. 497.) That decision has long been a rule of property in this state. The *Bell Case* has never been doubted in this state. This court, in deciding the case of *Largey v. Chapman*, 18 Mont. 567, took care not to use expressions which might raise suspicion as to the soundness of the *Bell Case*, for in the *Largey Case*, at page 567, we read: "Whatever we here hold in reference to a debt secured by mortgage being enforced by foreclosure of the mortgage does not in any way affect the question of enforcing the debt by exercising a power of sale contained in the mortgage. (*First National Bank v. Bell S. & C. M. Co.*, *supra*; same case, 156 U. S. 470.)"

MR. COMMISSIONER CALLAWAY prepared the following opinion for the court:

Appeal from a judgment of nonsuit, and from an order denying plaintiff's motion for a new trial.

Plaintiff alleged the execution of a mortgage by her to defendant Carroll on April 5, 1899, and his subsequent sale of the property therein mentioned, by virtue of a power of sale contained in the mortgage, to his co-defendant Morgan on January

29, 1900, her attempt on January 31, 1900, to redeem the property from the sale, Morgan's refusal to permit a redemption, his claim that plaintiff had no further interest in the property, and his offer to sell the property to her for \$850. Paragraphs 8 and 9 of the complaint are as follows:

"That plaintiff, laboring under the statements of the said defendants and their attorneys, that this plaintiff had no rights in the premises and was barred of the right of redemption, and laboring under a misapprehension of her rights and remedies, did on the 6th day of February, 1900, pay to the said defendants the sum of eight hundred and fifty (\$850) dollars, and received from said defendants a deed to said property. And plaintiff alleges that said defendants had no right to demand or receive from this plaintiff any amount in excess of \$588, and that the amount so paid in excess of \$588, to-wit, \$262, was an overpayment, and paid through mistake on the part of plaintiff, and said payment was made and caused to be made by and through the fraud, conspiracy and deceitful practices on part of the defendants.

"Plaintiff alleges that her right of redemption under the said sale had not expired at the time of said payment of the said eight hundred and fifty (\$850) dollars, and that said time of redemption would not expire until the 29th day of January, 1901."

No defects in the method of procedure adopted by the mortgagee in foreclosing the mortgage under the power of sale are alleged by plaintiff. Practically her sole contention is that she had the right to redeem the property within one year after the sale, but because of a mistake of law on her part, which was induced by fraud, conspiracy and deceitful practices on part of the defendants, she purchased the property instead of enforcing her right of redemption.

A mistake of law from which a court of equity will relieve is defined and governed by Section 2123 of the Civil Code, which reads: "Mistake of law constitutes a mistake, within the

meaning of this article, only when it arises from: (1) A misapprehension of the law by all parties, all supposing that they knew and understood it, and all making substantially the same mistake as to the law; or (2) A misapprehension of the law by one party, of which the others are aware at the time of contracting, but which they do not rectify." It is readily perceived that plaintiff's action is attempted to be brought under Subdivision 2 thereof.

The testimony on part of plaintiff discloses that, after the property had been purchased at the foreclosure sale by defendant Morgan, plaintiff's agent, John B. Bottego, and her attorney, Mr. Maury, applied to Morgan to be allowed to redeem the property, but Morgan refused, claiming that the right of redemption was barred by the sale. He offered the property to plaintiff for \$1,000, but after some negotiations took \$850 for it. Concerning this transaction Maury testified: "I advised him (Bottego) that our firm, Judge Pemberton and myself, both advised him that in our opinion the question was a very mooted one and difficult to determine either way, but in our opinion there was no right of redemption. They acted on that advice in the payment of the money. I was present when the deeds passed from Mr. Carroll to Bottego. This advice that I gave them was after the negotiations with Mr. Morgan in an attempt to redeem the property, which had been sold for the amount of the mortgage, interest and costs of sale." And again he said: "Mr. Morgan claimed that he had the fee-simple title absolute, and we agreed with those views." There is no testimony in the record showing, or tending to show, that the defendants did not at all times firmly believe that the plaintiff's equity of redemption was totally cut off by the foreclosure sale; and neither is there any testimony indicating in the slightest degree that defendants, or either of them, procured the plaintiff to purchase the property through fraud, conspiracy or deceit. As above noticed, it is not contended that the sale was not fairly conducted. The sale having been completed, the defendant Morgan took the position that he was then the absolute owner of the prop-

erty by virtue of the foreclosure sale, and the defendants are now contending for that same position in this court.

It thus plainly appears that, if it be true that plaintiff had one year from and after January 29, 1901, in which to redeem the property from the foreclosure sale, there was a misapprehension of the law by the defendants as well as by plaintiff, "all supposing that they knew and understood it, and all making substantially the same mistake as to the law."

It also becomes apparent that there is a fatal variance between plaintiff's allegations and her proof, and she did not ask leave to amend the pleading to conform to the proof, as she might have done.

She alleged a cause of action, which, if it comes within Section 2123 at all, comes within Subdivision 2 thereof; the proof she adduced, if it come within Section 2123 at all, comes within Subdivision 1 thereof; both her allegations and proof must come within one and the same subdivision, or she may not recover at all because of a mistake of law. Her allegation of mistake on her part and fraud on part of the defendants utterly excludes the idea of a mutual mistake. Thus the court did not err in granting the nonsuit.

This excludes any consideration of the interesting question as to whether plaintiff's equity of redemption was barred by the foreclosure sale.

It follows that the judgment and order should be affirmed.

PER CURIAM.—For the reasons given in the foregoing opinion, the judgment and order are affirmed.

MR. JUSTICE MILBURN, being absent, takes no part in this decision.

COTTER, RESPONDENT, v. BUTTE & RUBY VALLEY  
SMELTING COMPANY, APPELLANT.

(No. 1,931.)

(Submitted June 18, 1904. Decided July 9, 1904.)

*Corporations — Stockholders — Contract — Rescission — Instructions — Jury—Verdict—New Trial—Abuse of Discretion.*

1. Under Civil Code, Sections 2271, 2273, requiring that the party rescinding a contract must rescind promptly on discovering the facts, and must restore, or offer to restore, everything of value received under the contract, a complainant undertaking to rescind a contract of purchase of stock, under which he paid certain money, and demanding a return of the money, is not entitled to rescission, where the existence of none of the grounds of rescission is shown, and complainant has not complied with the prescribed rules governing rescission.
2. Where plaintiff rescinded a contract of purchase of stock and demanded a repayment of the money after he had been recognized as a stockholder and voted the stock, a finding for defendant was justified under an instruction that if plaintiff paid the money with the understanding that he was to receive stock, and defendant failed to deliver to him the stock in a reasonable time, the jury should find for plaintiff.
3. Where a company recognized plaintiff as a stockholder, and he was permitted to vote the stock at stockholders' meetings, he was estopped to deny a delivery of the stock to him and acceptance of it.
4. Where instructions warranted a finding for defendant, but were inconsistent and conflicting with other instructions, the court abused its discretion in granting a new trial on the ground that the verdict was against the law because contrary to the instructions, since the verdict, while opposed to some of the instructions, was warranted by others.
5. One can be a stockholder prior to the issuance and delivery to him of certificates of stock. The mere issue of the certificates of stock to him would but furnish him with evidence of his ownership.
6. The jury is bound by the law as given by the court, whether correct or not, and, if they do not follow such instructions in rendering their verdict, the verdict will be set aside and a new trial granted.

*Appeal from District Court, Silver Bow County; William Clancy, Judge.*

ACTION by George H. Cotter against the Butte & Ruby Valley Smelting Company. From an order granting plaintiff a new trial, the defendant appeals. Reversed.

*Mr. Robert McBride, and Mr. James E. Murray, for Appellant.*

As a proposition of law, appellant maintains that the instructions must be considered as a whole, and if contradictory instructions are to be found, some of which state the law and some of which do not, then those instructions which set forth the law correctly are to be considered as the law of the case, and a verdict brought in in accordance therewith cannot be said to be against law; in other words, if contradictory instructions are given, the whole charge must be considered together, and that construction must be adopted which will harmonize the different parts, if possible; or, if several instructions are given, some of which state the law, and some of which do not, then those instructions which set forth the correct law are to be considered as the law of the case. (Hayne on New Trial, Sec. 123.)

The certificate is not stock, but merely a convenient representative of it. It is only the indicia of title and the issuance of the certificate is not a necessary preliminary to constitute one a stockholder. (*Columbia Electric Co. v. Dixon*, (Minn.) 49 N. W. 244; *Mitchell v. Beckman et al.*, (Cal.) 28 Pac. 110; *Pacific Fruit Co. v. Coon*, (Cal.) 40 Pac. 542; *Cal. S. Hotel Co. v. Callender*, (Cal.) 29 Pac. 859, 861; *Marson v. Deither*, 52 N. W. 38.)

Mr. Cotter is not in a position to demand certificates for the ten thousand shares; neither is he in a position to ask for certificates representing the amount with which he is credited, for his contract or agreement with these parties called for ten thousand shares, and for which he has not fully paid. It is one contract and is indivisible. (*Johnson v. Albany S. R. R. Co.*, 54 N. Y. 416.)

The verdict of the jury must conform to the issue submitted to them, and in this case a verdict for any amount other than six thousand dollars would be in violation of this instruction

given at plaintiff's request, and would certainly be against law. (*Dixon National Bank v. Spielman*, 43 Ill. App. 475.)

A verdict for any other amount than the amount directed by these instruction would be set aside. (*Powers v. Gourad*, 19 Misc. Rep. N. Y. 268.)

A motion for a new trial, in so far as it is based upon errors of law occurring at the trial, presents a question of law and is not addressed to the discretion of the court. (*U. S. v. Trabring et al.*, 68 Pac. 821.)

An order granting a new trial is an appealable order which indicates that the trial judge who grants a new trial must not act arbitrarily but upon facts showing a legal ground. (*Bratsworth v. Aikem et al.*, 49 N. W. 419; *Clifford v. Denver, etc. R. R. Co.*, 20 Pac. 335; *Rowe v. Matthews*, 18 Fed. 132.)

The lower court having once granted a new trial, and thereafter having vacated that order, its jurisdiction ended, and it could not again open up the matter and allow another motion, upon any grounds which were presented, or might have been presented, in the first instance. The motion of plaintiff demanded a rehearing of a matter once determined and which was *res adjudicata*. (*Egan v. Egan*, 27 Pac. Rep. 22.)

*Mr. John J. McHatton*, and *Mr. George F. Shelton*, for Respondent.

MR. COMMISSIONER CLAYBERG prepared the following opinion for the court:

This is an appeal by defendant from an order granting plaintiff a new trial.

Plaintiff filed a complaint in which he sought to recover upon five separately stated causes of action. The defendant answered the first cause of action, and allowed judgment to be taken against it on the other four. Plaintiff replied to this answer by way of general denial. By these pleadings an issue was formed, which was tried before a jury, and a verdict was rendered for

defendant. Plaintiff moved for a new trial, which was also granted.

The cause of action thus tried arose out of the following circumstances: In 1899 a syndicate composed of Charles Schatzlein, William Owsley, Silas F. King, John W. Cotter and S. W. Davis agreed and mutually contracted to enter into a company or co-partnership for the purpose of carrying on smelting and mining operations through a lease of the properties of the Montana Smelting & Mining Company at Twin Bridges. It appears that these parties paid certain money to rehabilitate the properties leased, and to prepare for the operations of the company. Cotter paid \$6,000, and says: "There was a corporation to be formed, and we were to take stock in the corporation." The corporation was subsequently organized, and corporate meetings were held, at which Cotter participated as a stockholder, voting 10,000 shares of stock. Afterwards the capital stock of the corporation was increased, in which proceedings Cotter also participated as a stockholder. No certificate of stock was ever delivered to Cotter. After some time two of the syndicate turned over certain promissory notes to the First National Bank of Butte, and that bank brought suit thereon, attaching all the properties of the company. The record is somewhat indefinite as to the purpose and character of these notes, but, as we view the case, this matter is entirely immaterial. After the attachment Cotter gave notice to defendant and to its president and secretary in the following form: "Gentlemen: You and each of you are hereby notified and requested to return and pay over to me the sum of \$6,000 which was heretofore paid to the Butte & Ruby Valley Smelting Company, on or about the 15th day of September, A. D. 1899, as a subscription for stock in the said company, which said stock has never been delivered to me, and I have elected to rescind the said contract of subscription for stock, owing to the failure of the company to deliver the stock to me in accordance with the terms of my subscription; and I hereby demand that the said company immediately repay to me the said sum of \$6,000 with interest thereon from the date of



the payment of the same to the said company to the date of repayment of same to me. Dated, Butte, Mont., September 4, 1902. John W. Cotter." Subsequently Cotter assigned his claim to plaintiff, and this suit was brought.

1. The issue presented by the pleadings and proof was a very narrow one, and the evidence on material points was practically undisputed. Cotter says that he paid \$6,000, which the company used, and that he was to have stock in return for it. He admits that the company was organized; that stockholders' meetings were held, at which he participated as a stockholder, voting 10,000 shares of stock. It will be noticed that he undertook to rescind the contract under which the money was paid, and demanded a return of his money. He did not seek to compel the delivery to him of the certificates representing his stock, or to recover damages because the certificates were not delivered. His admissions that he paid the money for the benefit of the company and was to take stock therefor, and that he voted such 10,000 shares of stock as a stockholder in corporate meetings of the company, seem to us to be conclusive in this case that he was recognized as a stockholder by the company, and is estopped to claim the contrary. The mere issue of the certificates of stock to him would but furnish him with evidence of his ownership. One can be a stockholder prior to the issuance and delivery to him of certificates of stock. (Clark & Marshall on Private Corporations, Secs. 378a, 378b; Cook on Corporations, Sec. 13; *Cartwright v. Dickinson*, 88 Tenn. 476, 12 S. W. 1030, 7 L. R. A. 706, 17 Am. St. Rep. 910; *Mitchell v. Beckman*, 64 Cal. 117, 28 Pac. 110; *California Hotel Co. v. Callender*, 94 Cal. 120, 29 Pac. 859, 28 Am. St. Rep. 99; *Pacific Fruit Co. v. Coon*, 107 Cal. 447, 40 Pac. 542; *Packard Machinery Co. v. Laey*, 100 Wis. 644, 76 N. W. 596.)

Section 2271 of the Civil Code provides that contracts may be rescinded "in the following cases only": "(1) If the consent of the party rescinding, or of any party jointly contracting with him, was given by mistake, or obtained through duress, menace, fraud or undue influence, exercised by or with the connivance

of the party as to whom he rescinds, or of any other party to the contract jointly interested with such party; (2) if, through the fault of the party as to whom he rescinds the consideration for his obligation fails, in whole or in part; (3) if such consideration becomes entirely void from any cause; (4) if such consideration, before it is rendered to him, fails in a material respect, from any cause; or, (5) by consent of all the other parties."

Section 2273 provides that rescission "can be accomplished only" by compliance with the following rules: "(1) He must rescind promptly, upon discovering the facts which entitled him to rescind, if he is free from duress, menace, undue influence or disability, and is aware of his right to rescind; and, (2) he must restore to the other party everything of value which he has received from him under the contract, or must offer to restore the same, upon condition that such party shall do likewise, unless the latter is unable or positively refuses to do so."

The record is barren of pleading or proof of the existence of any of the grounds of rescission mentioned in Section 2271, *supra*, and of compliance with either of the rules announced in Section 2173, *supra*. There was, therefore, no rescission shown. Before the right to recover the money paid upon the contract arose, the contract must have been rescinded.

2. One of the grounds urged by plaintiff upon his motion for a new trial was that the verdict was "against the law," being contrary to the instructions of the court. All the instructions given are to be taken into consideration in determining this question, and if the verdict was justified by any of the instructions given, and the instructions as a whole were inconsistent or conflicted with each other, the verdict was not contrary to the instructions.

By instruction No. 1 the jury were charged that if they found from the evidence that Cotter paid to defendant \$6,000, or any amount, with the understanding that he was to receive a certain number of shares of the capital stock of the company, and if they

further found "that defendant failed or neglected to deliver to him shares of its capital stock within a reasonable time, or at all, thereafter," and that Cotter demanded a repayment to him of the amount and interest, and assigned his claim to plaintiff before the commencement of the suit, they should find a verdict for plaintiff. Under this instruction we believe that the jury was justified in finding a verdict for defendant. As above stated, the certificate of stock is merely evidence of ownership. The evidence disclosed that the company recognized Cotter as a stockholder to the extent of 10,000 shares, and that he voted that amount of stock as a stockholder at different stockholders' meetings of the company. In our opinion this is equivalent to a delivery of the shares of stock to Cotter and an acceptance by him which he is estopped to deny, and that the jury might have found such delivery, and therefore have rendered a verdict for defendant.

In instruction No. 2 the court charged the jury that if they found from the evidence that Cotter paid \$6,000 as subscription to the capital stock of said company, to be thereafter organized, and if they further found that the company was organized and did not deliver to Cotter the certificates of stock for which he had subscribed or paid, "and if you further find that after the expiration of such reasonable time he rescinded said contract, and demanded a repayment to him of the money so paid as a consideration for such stock, to be delivered," and if they further found that he assigned his claim to the plaintiff before the commencement of the suit, and that same has not been paid since the assignment, the verdict should be in favor of plaintiff for the amount so paid, together with interest. Instructions Nos. 4 and 5 also left the question of rescission to the jury. The jury may have found, and were justified in finding, under these instructions and the evidence, that the contract had not been rescinded.

In instruction No. 8 the court charged the jury that "you are instructed that the written notice offered in evidence in this case, signed by John W. Cotter, and notifying defendant that he had

elected to rescind the contract of subscription, and demanding a repayment of money claimed to be due him thereunder, was a sufficient rescission of said contract, and rescinded the same, provided you find that defendant failed to deliver to said John W. Cotter the stock subscribed for by him, as explained in these instructions." By this instruction the court took away from the jury the right to find as to whether or not Cotter rescinded the contract, but left the jury to find upon the delivery of the stock. This instruction is inconsistent with the others given, and clearly the jury might have returned a verdict for defendant upon a finding that the stock had been delivered.

The court below was evidently confused upon the necessity for the delivery of the *certificate of the shares* of stock, instead of placing Cotter in the position of a stockholder and recognizing him as such.

Under the cases of *Murray v. Heinze*, 17 Mont. 353, 42 Pac. 1057, 43 Pac. 714, and *King v. Lincoln*, 26 Mont. 157, 66 Pac. 836, the rule of this court has been established that the jury is bound by the law as given by the court, whether correct or not, and, if they do not follow such instructions in rendering their verdict, the verdict will be set aside and a new trial granted. This rule was adopted in California, as announced in the case of *Emerson v. Santa Clara County*, 40 Cal. 543. In our opinion this rule is not applicable in this case. Taking the whole charge of the court together, the jury was warranted by instructions 1, 2, 4 and 8, as above recited, to find a verdict for defendant.

In the case of *Altoona Quicksilver M. Co. v. Integral Quicksilver M. Co.*, 114 Cal. 100, 45 Pac. 1047, the court instructed the jury to find a verdict against plaintiff. At the same time he gave other instructions submitting the entire case to the jury. The court say: "In various instructions it submitted to the jury the question as to whether the plaintiff or its grantors had complied with the law in regard to the location and working the mine, and as to its claim of right by actual adverse possession.

The jury found for the plaintiff. In so doing they disobeyed the express direction to find against the plaintiff, but they obeyed the other direction to consider and pass upon the rights of the plaintiff, and to find according to the facts and principles of law declared by the court. The judge, in considering the case on motion for a new trial, was convinced that he had erred in directing the jury to find against the plaintiff, but thought, nevertheless, he was bound to grant a new trial on the authority of *Emerson v. Santa Clara Co.*, 40 Cal. 543, in which it was held that a verdict against the instruction of the court is a verdict against the law. This case is not within the reason of that case. Here the instructions were, in effect, contradictory, and the verdict, while opposed to one instruction, is warranted by others."

Under the case of *Murray v. Heinze*, *supra*, we are not allowed to consider the correctness of any of the instructions given to the jury, but we hold that we may look to the instructions to ascertain whether or not any thereof justified the verdict as returned by the jury. We have seen that the verdict was justified by instructions 1, 2, 4, 5 and 8.

We cannot conceive how any verdict could be rendered upon the testimony as disclosed in the record except one for defendant. This being the case, we can perceive no reason for granting a new trial, and we therefore conclude that the court below abused its discretion in granting the new trial prayed for, and advise that its action in that regard be reversed.

We have not been aided in the investigation of this appeal either by printed brief or oral argument in behalf of respondent.

PER CURIAM.—For the reasons stated in the foregoing opinion, the order appealed from is reversed, and the court below instructed to set aside the order granting the plaintiff a new trial.

MR. JUSTICE MILBURN, not having heard the argument in this case, does not participate in this decision.

SHAW, APPELLANT, v. NEW YEAR GOLD MINES COMPANY, RESPONDENT.

(No. 1,923.)

(Submitted June 15, 1904. Decided July 9, 1904.)

*Master and Servant—Explosion in Mine—Injury to Servant—Negligence—Proximate Cause—Burden of Proof—Duty to Adopt Rules—Nonsuit—Appeal—Evidence—Review.*

1. In an ordinary case of negligence, the burden of proof is upon plaintiff to show by competent evidence the negligence of defendant as alleged, and also that such negligence was the proximate cause of plaintiff's injury.
2. To justify reversal on appeal from a nonsuit in an action for personal injuries, the evidence must not leave either the negligence of defendant, or that it was the proximate cause of the injury, to conjecture; and, if it is equally consonant with some theory inconsistent with either of these facts, it does not tend to prove them, within the rule that whatever the evidence tends to prove will on such an appeal be taken as established.
3. In an action against a mine owner for injuries to a miner caused by an explosion, evidence held not to justify submission of the issue of defendant's negligence.
4. While a master is bound to use reasonable diligence to provide and maintain a safe place to work, such rule does not apply to a case where servants are creating the place of work, when it is constantly being changed in character by their labor, when it only becomes dangerous by the carelessness or negligence of the workmen, when the dangers which arise are very short-lived, or when by the negligence of the workmen the place is rendered unsafe without the master's fault or knowledge.
5. Mere failure of a master to adopt rules to prevent injury to a servant is not proof of negligence, unless it appears that the master, in the exercise of reasonable care, should have foreseen the necessity for such precaution.

*Appeal from District Court, Cascade County; J. B. Leslie, Judge.*

ACTION by E. A. Shaw, as administrator of the estate of Joseph L. Adams, deceased, against the New Year Gold Mines Company. From a judgment for defendant, plaintiff appeals. Affirmed.

*Mr. A. C. Gormley, and Mr. Richard Bennett, for Appellant.*

The motion for nonsuit should have been overruled because, first, no sufficient grounds were set forth in said motion; and,

second, the case was one for the jury, no matter what grounds might have been stated in said motion. (*Jacobs Sultan Co. v. Union Merc. Co.*, 17 Mont. 61; *Palmer v. Marysville Dem. Pub. Co.*, 90 Cal. 168, 27 Pac. 21; *Frank v. Mining Co.*, 56 Pac. 419; *McIntyre v. Ajax Min. Co.*, 60 Pac. 552; *Lewis v. Min. Co.*, 61 Pac. 860; *Boyle v. Union Pac. R. R. Co.*, 71 Pac. 988; *Kelley v. Cable Co.*, 7 Mont. 70, 8 Mont. 440, 13 Mont. 411, 16 Mont. 484; Civil Code, Secs. 2660, 2661, 2662.)

Lacourcier, Roberts' partner, died before the trial, but there is nothing to show that he was negligent in any way, under any phase of the case. And, in any event, his negligence would not excuse the defendant if it was also negligent. (*Freeman v. Sand Coulee Coal Co.*, 25 Mont. 194.)

In the case at bar it seems to be defendant's position that the two men going off shift were to notify the on-coming shift of any missed holes. What difference can it make whether this duty was to be performed by all the outgoing shift or one particular member of it? The point is that this duty belongs to the master, and whoever represents him in this duty, even though otherwise a fellow-servant with the man coming on shift, is in this particular a vice-principal, for whose neglect the master is liable. (*Shannon v. Con. Tiger & Poorman Min. Co.*, 64 Pac. 169; *McDonough v. Great Northern Ry. Co.*, (Wash.) 46 Pac. 334; *Wheeler v. Wason Mfg. Co.*, 135 Mass. 297; *Wellston Coal Co. v. Smith*, 65 Ohio St. 70, 55 L. R. A. 99; 1 Thompson on Neg., Secs. 532-3; *Railroad Co. v. Herbert*, 116 U. S. 642.)

In the case cited below there was evidence that the foreman did not take much notice of any of the wagons; that it was not customary for teamsters to speak to him about repairing wagons, but that they would themselves look after their own wagons, and, if they saw one in bad order, they would take it to the shop. "But it does not appear—certainly not by undisputed evidence—that the plaintiff had any knowledge of such custom. Besides, the law is well settled that it is the duty of the master to provide suitable and safe machinery and appliances for the

use of his employes and keep the same in repair, and that the master cannot shift such duties onto his subordinates." (*Boelter v. Ross Lumber Co.*, (Wis.) 79 N. W. 243.)

Defendant was held not entitled to nonsuit where servants were acting without any regulations, and simply followed a dangerous practice sanctioned by time and custom. (*Doing v. N. Y. Co.*, (N. Y.) 45 N. E. 1028; *Bushby v. N. Y. Co.*, (N. Y.) 14 N. E. 407.)

Where the duty is the master's, liability for proper performance is not shifted by the adoption of rules or regulations providing for performance of act or duty by an agent of the master. (*Hankins v. N. Y. Co.*, (N. Y.) 142 N. Y. 416, 25 L. R. A. 396; *Mo. Pac. Ry. Co. v. McElyea*, (Tex.) 1 L. R. A. 411; *Crisswell v. Pittsburgh, etc. Co.*, 6 S. E. 31; *Bookrum v. Ry. Co.*, (Tex.) 57 S. W. 919.)

It is the duty of persons or corporations having many men in their employ, and carrying on a dangerous and complicated business, to make rules which, if observed, will afford reasonable protection to the employes against the dangers incident to the performance of their respective duties. Failure to do so is negligence, and for injuries to an employe resulting from such failure of duty the master is liable. (20 Ency. of Law, 2d Ed., 101-2, 159-161.)

The master is bound to exercise such supervision as will make it reasonably certain that the business is being carried on pursuant to the rules as framed. (*McElligott v. Randolph*, 22 Atl. 1094; *Gerrish v. New Haven Ice Co.*, 27 Atl. 235; *The Pioneer*, 78 Fed. 600.)

While it is true that the employe assumes the ordinary risks incident to his employment, the risks thus assumed by him are those only which occur after the due performance by the master of those duties which the law imposes upon him. (*Himrod Coal Co. v. Clark*, (Ind.) 64 N. E. 282; *City of Emporia v. Kowalski*, (Kan.) 71 Pac. 232; *Pantzar v. Tilly Foster Co.*, 99 N. Y. 368, 2 N. E. 24; *Schroeder v. C. & A. R. Co.*, 108 Mo. 322; *Pullman Palace Car Co. v. Laack*, (Ill.) 18 L. R. A. 219.)



It has been held that a company cannot escape liability for its own negligence by printing and publishing rules in and about the mine. Such rules are nothing but attempts to make laws, and so far as they are claimed to operate as a contract against the negligence and dereliction of the mining company they are void, as against public policy. The general principle is that a master cannot, by contract with a servant, in consideration of the employment, exempt himself from liability to the servant for injuries sustained through his negligence, such contract being void as against public policy. (*Himrod Coal Co. v. Clark*, (Ind.) 64 N. E. 282; *Holmes v. So. Pac. Co.*, (Cal.) 52 Pac. 654.)

The negligence of the master in keeping the place safe is not a hazard necessarily attendant upon the occupation of the servant, nor is it one which he, in legal contemplation, is presumed to risk in the service of the master. Where the nature of the business is such as to require it, the law also imposes upon the master the duty of making and promulgating suitable rules for the protection of the employes. (*Pool v. S. P. R. R. Co.*, (Utah) 58 Pac. 328; *Faulkner v. Mammoth Min. Co.*, (Utah) 66 Pac. 799.)

While a servant assumes the risks ordinarily incident to his employment, and all open and visible risks, including the negligence of a fellow-servant, yet he has a right to presume that the master will exercise due care for his safety by providing, when necessary, all such needful rules for the conduct of its business, or such precautionary measures, as will not needlessly expose him to risks not necessarily resulting from his employment. (*Will v. Oregon S. L. & U. N. Ry. Co.*, (Ore.) 27 Pac. 954.)

If an occupation attended with danger can be prosecuted by proper precautions without fatal results, such precautions must be taken by the promoters of the pursuit or employers of laborers thereon. Liability for injuries following a disregard of such precautions will otherwise be incurred, and this fact should not be lost sight of. So, too, if persons engaged in dangerous occu-

pations are not informed of the accompanying dangers by the promoters thereof, or by the employers of laborers thereon, and such laborers remain in ignorance of the dangers and suffer in consequence, the employers will also be chargeable for the injuries sustained. (*Mather v. Rillston*, 156 U. S. 391, 15 S. C. R. 464, 39 L. Ed. 464.)

The employer cannot escape liability by leaving to the employes the regulation of matters which he ought to have provided for. (*Tedford v. Los Angeles Electric Co.*, (Cal.) 54 L. R. A. note 86-8.)

"Where the servant acts under the immediate direction of the master's foreman, that fact is equivalent to an assurance that the servant may safely proceed; and he is not bound in such case to search for danger, but may rely on the conduct and judgment of the foreman." (*Faulkner v. Mammoth Min. Co.*, (Utah) 66 Pac. 800; *Herdler v. Range Co.*, 136 Mo. 3, 37 S. W. 115; *Sullivan v. Railroad Co.*, 107 Mo. 78, 17 S. W. 748; *Louisville, etc. Ry. Co. v. Hanning*, (Ind.) 31 N. E. 187; *Goldthorpe v. Clark-Nickerson Co.*, (Wash.) 71 Pac. 1093; *Thompson*, Neg. p. 851; Civil Code, Sec. 2660.)

It was for the jury to consider all the various elements that go to make up ordinary care, and then say whether "the defendant knew, or by the use of reasonable diligence might have known, of the existence of the danger from this unexploded blast," and, if so, whether it informed Adams of such danger. (*Cain v. Gold Mt. Mining Co.*, 27 Mont. 529.)

*Mr. Ransom Cooper*, for Respondent.

MR. COMMISSIONER CLAYBERG prepared the following opinion for the court:

Appeal from a judgment of nonsuit. Joseph Adams, who was plaintiff's intestate, brought suit against the New Year Gold Mines Company to recover damages for personal injury caused by the alleged negligence of defendant.

The material allegations of the complaint as to this negligence are as follows:

"(4) That the plaintiff, at the time of the accident, hereinafter set forth, and for some time prior thereto, was actually engaged and employed by the defendant as a miner in said Old Bach mine; that the plaintiff was employed as such miner in drilling, blasting and driving a tunnel in said mine.

"(5) That it was the duty of the defendant to provide and maintain a reasonably safe place for the plaintiff to work in, and to keep and maintain said tunnel in which plaintiff was working in a safe condition, so as not to expose the plaintiff to any unnecessary or extraordinary hazard or peril.

"(6) That the defendant failed and neglected to perform and discharge its said duty to the plaintiff, and knowingly and negligently permitted the place in which plaintiff was working to become unsafe, thereby exposing the plaintiff to extraordinary hazard and peril, as is more particularly set out in the next paragraph herein.

"(7) That on the morning of the 25th of September, 1900, while the two men employed on the day shift in said tunnel were at work therein, and immediately after the two miners aforesaid had loaded a hole with blasting powder in the bottom of the tunnel, as it was their custom and duty to do at said time, the foreman of the defendant came to the place where said men were working, and ordered and directed them not to fire the hole loaded by them with blasting powder as aforesaid; that said men obeyed the instructions of said foreman, and left the said blast as it was, and the same remained unexploded until the accident to the plaintiff as herein stated; that said men on the day shift quit work at 6 o'clock on said day, and that the plaintiff and his partner on the night shift went to work, as was their duty, at 7:30 p. m. on said day, in the same place where said day shift had been working; that the plaintiff, shortly after commencing work as aforesaid, started in to clean up the bottom of said tunnel which had been left by the day shift, and which it was the

duty of the plaintiff to do, and plaintiff accordingly began to drill holes in the bottom of said tunnel a few feet from the face of the drift, for the purpose of loading them with blasting powder and cleaning up said bottom, and while the plaintiff was so drilling in said place the charge of blasting powder loaded by the day shift in the morning as aforesaid exploded, which explosion caused plaintiff to receive severe and grievous injuries, his left eye being blinded and the sight in the other eye being seriously affected, his jaw being fractured, most of his teeth being knocked out, his side and chest being severely bruised and injured, his left hand being almost blown off, so that it was necessary to have the same amputated, his right hand being rendered crippled and useless, and suffering also a compound fracture of the left arm between the elbow and the wrist, said injuries causing him great and excruciating pain and suffering, and confining him to the house and hospital for several months; that when plaintiff went to work on the evening of September 25th as aforesaid, and up to the time when said accident occurred, plaintiff did not know and had no means of knowing that there was at said place, or anywhere in said tunnel, any charge or charges of blasting powder not shot off, and could not have discovered the fact except by being informed thereof; that the defendant and its said foreman knew, or by the use of reasonable diligence might have known, of the existence of said unexploded blast, and of the danger to the plaintiff therefrom, and it was the bounden duty of the defendant and its said foreman to convey such information to plaintiff, but that the defendant and its said foreman failed and neglected so to do, and willfully, knowingly and negligently allowed and directed the plaintiff to go to work in said place, where his duty called him, in ignorance of said danger; that said explosion occurred and plaintiff was injured as aforesaid without any fault or negligence on his part, but solely because of the defendant's negligence as aforesaid; that the said foreman was the vice-principal of the defendant in all matters relating to the working and operating of said Old Bach mine, and with reference to the employment of

the plaintiff and the other miners mentioned herein, and that the negligence of said foreman as aforesaid was the negligence of the defendant."

"(9) That by reason of the said neglect and omission of the defendant to keep and maintain a safe place wherein plaintiff was required to work as aforesaid as defendant's employe, and by reason of the injuries suffered by plaintiff solely because of said negligence and want of ordinary care on the part of the defendant, as hereinbefore set forth, the plaintiff has been damaged by the defendant in the sum of thirty thousand dollars."

The answer of defendant denies that the injuries to plaintiff were caused by the negligence of defendant. Sets up contributory negligence on the part of plaintiff. Alleges that he had been employed at the mine for some time, knew the conditions, and knew that in running the tunnel it was necessary for the employes to drill holes, put blasts in the rock in the breast of the tunnel, and explode them; that he had been engaged for a long time in the performance of that kind of work, and well knew that sometimes such blasts would miss fire and fail to go off, and that it was sometimes difficult for the man who put in blasts to ascertain whether all the balsts fired went off; that the danger from unexploded blasts was incident to this class of employment; that those engaged in the work of running the tunnel assumed the risk; that he voluntarily continued his services, with full knowledge of the risk, without objection; and that, if plaintiff was injured by the negligence of any one, it was the negligence of fellow servants, for which defendant was not responsible.

At the close of plaintiff's testimony, defendant moved for a nonsuit, which was granted, and judgment entered in favor of defendant. From this judgment plaintiff appeals.

1. Counsel for appellant insists that, by the decisions of this court upon appeals from judgments of nonsuit, it is well settled that whatever the evidence tends to prove will be considered as proven, and that a judgment upon a nonsuit will not be sus-

tained unless the conclusion from the facts necessarily follows, as a matter of law, that no recovery could be had in any view which could be reasonably taken from the facts which the evidence tends to prove. (*Cain v. Gold Mountain M. Co.*, 27 Mont. 529, 71 Pac. 1004; *Coleman v. Perry*, 28 Mont. 1, 72 Pac. 42; *Ball v. Gussenhoven*, 29 Mont. 321, 74 Pac. 871; *Michener v. Fransham*, 29 Mont. 240, 74 Pac. 448; *Nord v. Boston & Montana Consol. C. & S. Mining Co.*, 30 Mont. 48, 75 Pac. 681; *McCabe v. Montana Central Ry. Co.*, 30 Mont. 323, 76 Pac. 601; *Cummings v. Helena & Livingston S. & R. Co.*, 26 Mont. 434, 68 Pac. 852.)

Under this rule, however, the record must contain competent testimony fairly tending to affirmatively prove the allegations of the complaint. The burden of proof is upon plaintiff, and is not satisfied if the conclusion to be reached from the testimony offered is merely a matter of conjecture. If such conclusion be equally consonant with the truth of the allegations, and with some other theory or theories inconsistent therewith, it becomes a mere conjecture, and the rule of the burden of proof is not satisfied. Thus, in an ordinary case of negligence, like the one under consideration, plaintiff has the burden of proving the negligence of defendant as alleged, and also that such negligence was the proximate cause of plaintiff's injury. If the testimony leaves either the existence of negligence of defendant, or that such negligence was the proximate cause of the injury, to conjecture, it is insufficient to establish plaintiff's case. If the conclusion to be reached from the testimony is equally consonant with some theory inconsistent with either of the issues to be proven, it does not tend to prove them, within the meaning of the rule above announced. The use of the word "tend" does not contemplate conjecture. It contemplates that the testimony has a tendency to prove the allegations of the complaint, and not some other theory inconsistent therewith. (*Patton v. Texas & Pac. Ry. Co.*, 179 U. S. 658, 21 Sup. Ct. 275, 45 L. Ed. 361; *Deschenes v. Concord & M. Railroad*, 69 N. H. 285, 46 Atl. 467; *Searles v. Manhattan Ry. Co.*, 101 N. Y. 661, 5 N. E. 66;

*Dobbins v. Brown*, 119 N. Y. 188, 23 N. E. 537; *Atchison, T. & S. F. R. Co. v. Alsdurf*, 68 Ill. App. 149; *Breen v. St. Louis Cooperage Co.*, 50 Mo. App. 202; *Meehan v. Speirs Mfg. Co.*, 172 Mass. 375, 52 N. E. 518; 2 Labatt on Master and Servant, Secs. 283, 287, and notes.)

Justice Brewer uses the following language in *Patton v. Texas & Pac. Ry. Co.*, 179 U. S. 658, 21 Sup. Ct. 275, 45 L. Ed. 361: "And where the testimony leaves the matter uncertain, and shows that any one of half a dozen things may have brought about the injury, for some of which the employer is responsible, and for some of which he is not, it is not for the jury to guess between these half a dozen causes, and find that the negligence of the employer was the real cause, when there is no satisfactory foundation in the testimony for that conclusion. If the employe is unable to adduce sufficient evidence to show negligence on the part of the employer, it is only one of the many cases in which the plaintiff fails in his testimony, and no mere sympathy for the unfortunate victim of an accident justifies any departure from settled rules of proof resting upon all plaintiffs."

The record discloses no direct evidence concerning the occurrence of the accident. Adams, the injured man, died before the trial of the case, and his administrator was substituted. The evidence concerning the actual facts occurring at the time of the accident is therefore entirely circumstantial, and the direct and proximate cause thereof is entirely a matter of inference, to be deduced from the circumstances and other facts detailed by the witnesses. We do not desire to be understood that a plaintiff may not make out a case of actionable negligence against a defendant by circumstantial evidence, but such circumstantial evidence must tend directly to establish the cause of action, and not some theory inconsistent therewith.

In this case the accident is claimed to have occurred from an unexploded charge. This is possible. It is equally possible that it occurred from an unexploded piece of dynamite which had become dislodged from a loaded hole by other blasts, and inter-

mingled with the waste which it was Adams' duty to clean up, or from the negligence of Adams himself. Many other theories of the accident present themselves, which are equally deducible from the facts disclosed by the record. Under the above authorities, this is insufficient to satisfy the rule that the burden of proof is upon plaintiff to show by competent proof that the defendant was negligent, and that the injury occurred as the proximate result of such negligence.

2. While it is a general rule that a master is bound to use reasonable diligence to provide a servant with a safe place in which to work, and to maintain such condition during the term of employment, such rule should have no application to a case when the plaintiff and his fellow servants are creating the place of work; when it is constantly being changed in character by the labor of the men working upon it; when it only becomes dangerous by the carelessness or negligence of the workmen, or by the negligent manner in which they use the tools or materials furnished for their work; when the dangers which arise are very short-lived; or when, by the negligence of the workmen, the place is rendered unsafe without the master's fault or knowledge.

The Supreme Court of Utah, in the case of *Anderson v. Daly M. Co.*, 16 Utah, 28, 50 Pac. 815, uses the following language: "While the employer is bound to furnish a safe place for the servant to work in, he is not bound to make it an absolutely safe place; but in a place where the nature of the business is such that the conditions are continually changing by reason of the putting in and setting off of blasts, and of continuing excavations in a shaft, and thereby temporarily dangerous conditions arise, the employer cannot be held responsible therefor. \* \* \* The employer was bound to furnish a reasonably safe place and appliances with which to do the work. But where the nature of the business is extremely dangerous, and conditions are necessarily continually changing by reason of placing and setting off blasts, whereby dangerous conditions arise continually through the acts of the servant, without the knowledge of the master, the



employer cannot be held responsible therefor without his fault."

In *Davis v. Trade Dollar Cons. M. Co.*, 117 Fed. 122, 54 C. C. A. 636, the court says: "It is true that the law of master and servant requires that the former furnish the latter a safe place in which to work, but the master is not required to furnish the servant a safe place in which to work where the danger is temporary, and when it arises from the hazard and the progress of the work itself, and is known to the servant. The master is not required to be present at the working place at all times in person or by a representative, to protect a laborer from the negligence of his fellow workmen or from his own negligence in the constantly changing conditions of the work."

In *Browne v. King*, 100 Fed. 561, 40 C. C. A. 545, the court says: "The danger was temporary. It was danger incident to the very work plaintiff was employed to perform. Until in the progress of the work the missed shot failed to explode, there was no danger." See, also, *Mancuso v. Cataract, etc. Co.*, (Sup.) 34 N. Y. Supp. 273; *Hussey v. Cogger*, 112 N. Y. 614, 20 N. E. 556, 3 L. R. A. 559, 8 Am. St. Rep. 787; *Mechan v. Speirs Mfg. Co.*, 172 Mass. 375, 52 N. E. 518; *Finlayson v. Utica M. & M. Co.*, 67 Fed. 507, 14 C. C. A. 492; *City of Minneapolis v. Lundin*, 58 Fed. 525, 7 C. C. A. 344; *Wiskie v. Montello Granite Co.*, 111 Wis. 443, 87 N. W. 461, 87 Am. St. Rep. 885; Labatt on Master and Servant, Secs. 269, 588, 612.

The cases of *Shannon v. Cons. T. & P. Mining Co.*, 24 Wash. 119, 64 Pac. 169, and *McMillan v. North Star M. Co.*, 32 Wash. 579, 73 Pac. 685, 98 Am. St. Rep. 908, are seemingly to the contrary, but clearly distinguishable from the case at bar, as to the facts involved. But however this may be, we are of the opinion that the rule adopted by this opinion is based upon the better reasons, and is better adapted to the conditions of this state, where the mining industry is of such vast importance. Any other doctrine would place the master in the position of an insurer.

3. We are of the opinion that no negligence of defendant was shown, and that no proof was offered which even tended to

show such negligence. Negligence is a breach of duty. The duty of defendant was to exercise due diligence in furnishing and maintaining a reasonably safe place in which Adams was to work. There is no evidence in the record tending to show that the tunnel was an unsafe place of itself, and it is only claimed that it became unsafe by reason of a blast left by the workmen on the preceding shift unexploded and undischarged. The negligence of defendant is claimed to exist in this case upon two theories: First, that the miners who worked in the tunnel at the point where Adams worked and was injured, during the preceding shift, prepared and loaded two holes, but did not fire them because directed not to do so by Winston, the foreman, and that such holes were left unexploded until the time of the accident, and that Adams was not notified of these facts; and, second, that an unexploded hole was left at the breast of the tunnel, and that Adams was not notified of the existence of such hole.

As to the first theory. The proof presented in the record discloses the following state of facts: Roberts and Lacourcier were working in the tunnel—Lacourcier at the breast thereof, and Roberts stoping ore about ten feet back of the breast, above the roof of the tunnel; that Lacourcier had drilled and loaded ready for blasting two holes near the bottom of the tunnel, at its breast; that Roberts had stoped down ore which lay in the bottom of the tunnel adjacent to the place where the loaded holes were situated. Winston, the foreman, came into the tunnel. A conversation ensued between Roberts and Winston, whereby the attention of Winston was called to the fact that, if the holes were shot at that time, the waste arising from the shots would get mixed with the ore which Roberts had stoped down, and that Winston said that the carman (whose duty it was to remove the ore after it had been stoped down) was in the other tunnel, and would not be up there until after dinner. Winston then directed Lacourcier not to fire the holes. It is evident from these circumstances that the only reason Winston told Lacourcier not to fire the holes was because the waste from the blasts would become mixed with the ore that had been stoped by Roberts and

lay on the floor of the tunnel. It will be noticed that no instructions were given to Lacourcier not to fire the holes after the ore had been removed. Lacourcier did not fire the holes at that time, but proceeded with his work of drilling other holes, but before the close of the shift at 6 o'clock in the evening Lacourcier fired three holes and Roberts fired three holes. The ore which lay in the bottom of the tunnel when Winston directed Lacourcier not to fire the shots must have been removed, as the only object of such directions was to prevent the waste becoming mixed with the ore. The result would have been the same by firing any of the blasts in the face of the tunnel. It is very evident that it was only intended by Winston, and understood by Lacourcier and Roberts, that the holes were not to be fired until the ore was removed. Roberts testifies that they fired six shots—three holes that had been drilled and loaded by Roberts, and three which had been drilled and loaded by Lacourcier; that after lighting the fuses they retired some distance, and listened for the reports of the shots, and counted six of them. Roberts says he could distinguish the holes fired by himself from the holes fired by Lacourcier because the ground was softer, and he had put in larger charges. Lacourcier and Roberts then left the mine, believing that all the holes which had been loaded in the tunnel during the shift had been fired by them. The evidence discloses that Winston was not in the tunnel during the afternoon, and had no knowledge as to whether the holes which he had directed in the forenoon should not be fired, had been afterwards fired by Lacourcier. There is no evidence tending to show that defendant or any of its officers or superintendent knew of the instructions of Winston, or had any knowledge as to whether the shots were left unfired before the close of the shift. There was, therefore, no negligence proven against either Winston or defendant.

As to the second theory. It is very doubtful whether, under the complaint, the plaintiff can claim that any negligence is alleged except that comprehended in the first theory, above discussed; but, inasmuch as the second theory of plaintiff is as equally unsupported by the evidence as the first, we will not pass

upon the sufficiency of the allegations of the complaint in that regard. The second theory is based upon the proposition that there was an unexploded hole near the breast of the tunnel which the defendant knew about, or by the exercise of reasonable diligence could have known about, and did not inform Adams of its existence. We cannot conceive how the defendant could have known of an unexploded hole. Neither do we believe that it was defendant's duty, before allowing the next shift to go to work, to investigate the conditions, and ascertain whether all the holes fired by Roberts and Lacourcier had exploded. Roberts and Lacourcier went off shift at 6 o'clock, immediately after firing the holes. The testimony discloses that it would be unsafe for any one to go into the tunnel for some time after the explosions on account of the bad air generated by the explosions, and the danger of further explosions from parts of the charges which might not have been fully exploded. Adams went on shift at 7:30 in the evening. It was his duty to clean up the refuse in the tunnel caused by the explosions of shots fired by Lacourcier and Roberts. It was the usual custom, just before the close of every shift, for the miners who worked in the tunnel to fire their shots, and it was the duty of the incoming shift to clean up the refuse thrown out by such shots before going to work in the advancement of the tunnel. Adams knew that shots had been fired. The testimony also discloses that all the miners knew that sometimes there might be a missed hole, which was extremely dangerous. No one knew or thought any hole had missed fire or was unexploded. Why any one should tell Adams that there was an unexploded or missed hole in the breast of the tunnel when nobody believed it existed is beyond comprehension. Testimony was given to show that it was the custom in that mine for the miners, when they went off shift, if there was a missed hole, to notify the shift succeeding them; but this was only in cases where the offgoing shift thought there might be a missed or undischarged hole. If the duty existed at all to inform Adams of the conditions of the mine as left by the preceding shift, it was a duty devolving upon his fellow servants,

which Adams knew and well understood; and, if this duty was not complied with, it was the negligence of a fellow servant, and not of the defendant.

4. Plaintiff, in his brief and argument, presents a still further proposition to the court, and that is that it became the duty of the defendant to make reasonable rules and regulations for the protection of the miners, whereby they might be notified of hidden dangers from unexploded or missed shots in the breast of the tunnel.

The Supreme Court of Oregon had this question under consideration in the case of *Johnson v. Portland Stone Co.*, 40 Oregon, 436, 67 Pac. 1013, and use the following language: "It is also claimed that the defendant was negligent in not promulgating rules by the observance of which the accident could have been avoided. There was nothing in the nature of the business in which the plaintiff was engaged at the time of the injury which made it necessary for the defendant to make and publish rules. The mere failure to adopt rules is not proof of negligence unless it appears that the master, in the exercise of reasonable care, should have foreseen and anticipated the necessity for such precaution. It is not suggested in this case what particular rules could have been adopted that would have been likely to prevent the accident." We agree with the doctrine thus announced. It was not shown what particular rules could have been adopted that would have been likely to prevent the accident. (See, also, *Davis v. Trade Dollar Cons. M. Co.*, *supra*.)

But, again, it is clearly apparent that the method of driving the tunnel was only a detail of the work in which Adams was engaged, and it is well established that the master is never liable for any negligence in carrying out the details of the work if the place in which the work is conducted is in itself safe, and the dangerous condition is brought about only by the negligence of the men working there. (*Mancuso v. Cataract Cons. Co.*, (Sup.) 34 N. Y. Supp. 273; *Davis v. Trade Dollar Cons. M. Co.*, 117 Fed. 122, 54 C. C. A. 636; *Johnson v. Portland Stone Co.*, 40

Oregon, 436, 67 Pac. 1013; *Cullen v. Norton*, 126 N. Y. 1, 26 N. E. 905.)

We have not considered the questions as to whether plaintiff assumed the risk of danger from unexploded blasts, or as to whether Winston was a fellow servant or a vice principal, as neither is necessary to this decision.

The unfortunate accident disclosed by the record arouses the sympathy of all, but, "in view of all the circumstances, as they appear by the evidence, the calamity seems to have been a casualty from a cause unforeseen, and not within reasonable apprehension" (*Mancuso v. Cataract Cons. Co.*, *supra*), and "no mere sympathy for the unfortunate victim of an accident justifies any departure from settled rules of proof resting upon all plaintiffs." (*Patton v. Tex. Pac. Ry. Co.*, *supra*).

We therefore advise that the judgment appealed from be affirmed.

PER CURIAM.—For the reasons stated in the foregoing opinion, the judgment is affirmed.

MR. JUSTICE MILBURN, not having heard the argument, takes no part in this decision.

Rehearing denied September 28, 1904.

MORRISON, APPELLANT, v. JONES ET AL., RESPONDENTS.

(No. 1,929.)

(Submitted June 17, 1904. Decided July 9, 1904.)

*Mortgages—Deed Absolute on Its Face—Existence of Debt—Evidence—Nonsuit.*

1. No conveyance absolute on its face can be a mortgage unless made to secure the payment of a debt or the performance of a duty.

2. A lease and option to purchase was assigned to secure a debt, the assignee to collect and account for the rents. Later the assignor deeded to the assignee, for a consideration much larger than the original debt, all her right and title to the property, the assignee agreeing to reassign if the assignor should pay him the consideration expressed in the deed before exercise of the option, and to reassign thereafter on payment of a larger sum. *Held*, that the deed was not a mortgage, there being no debt secured.
3. In an action to have a deed declared a mortgage the court may, on defendant's motion for a nonsuit, decree the instrument to be a deed, though there is no technical nonsuit in an equitable action.
4. In an action to have a deed decreed a mortgage, an agreement executed concurrently with the deed, whereby the grantee agreed to reconvey on certain conditions, was properly admitted in evidence.

*Appeal from District Court, Silver Bow County; William Clancy, Judge.*

ACTION by Elizabeth Morrison against J. O. Jones and wife. From a judgment for defendants, and from an order overruling a motion for a new trial, plaintiff appeals. Affirmed.

*Messrs. Kirk & Clinton, and Mr. Peter Breen, for Appellant.*

"Where there is a deed and a contract to reconvey, and oral evidence has been introduced tending to show that the transaction was one of security, and leaving upon the mind a well-founded doubt as to the nature of the transaction, then courts of equity incline to construe the transaction as a mortgage." (*Morris v. Budlong*, 78 N. Y. 543; *Cosby v. Buchanan*, 1 South. Rep. 898; *Ferris v. Wilcox*, 51 Mich. 105; *Conway's Ex'rs v. Alexander*, 7 Cranch. 218; *Hickman v. Cantrell*, 9 Yerg. 171.)

Parol evidence may be admitted to show that deeds and contracts to reconvey were given as security, and are therefore a mortgage. (*Peugh v. Davis*, 96 U. S. 333; *Farmer v. Grose*, 42 Cal. 169; *Hickman v. Cantrell* 9 Yerg. 171; 2 Devlin on Deeds, Sec. 1136, and cases cited; Jones on Mortgages, Sec. 248, and cases cited; Secs. 3814 and 3751, Civil Code of the State of Montana; *Brick v. Brick*, 98 U. S. 516; *Voss v. Eller*, 109 Ind. 263.)

On motion for a nonsuit, everything the evidence tends to prove is assumed to be true on appeal. (*Emerson v. Eldorado*

*Ditch Co.*, 18 Mont. 254; *Herbert v. King*, 1 Mont. 475; *Gans v. Woolfolk*, 2 Mont. 463; *McKay v. Montana Union Ry. Co.*, 13 Mont. 15; *State ex rel. Pigott v. Benton*, 13 Mont. 306.)

*Mr. George F. Shelton*, and *Mr. John J. McHatton*, for Respondents.

First. There is no specification of insufficiency of the evidence to support the order of the court granting the nonsuit. Therefore, the court will not review the evidence. (*Cain v. Gold Mt. Min. Co.*, (Mont.) 71 Pac. 1004; *Swift v. Min. Co.*, (Cal.) 70 Pac. 470; *Bell v. Staacke*, (Cal.) 70 Pac. 474.)

Second. If the court should consider the evidence, the evidence conclusively establishes that the deed is an absolute deed. It appears that the deed and the written agreement were entered into about the same time (the agreement delivered after the deed was given), and that they constitute the whole contract between the parties. All the talk and negotiations referred to by the witness Morrison, if it took place at all, took place before the execution of the deed and the agreement. The writing constitutes the whole agreement and is not subject to be modified. (Sec. 3132, Code of Civil Procedure; see, also, *Housekeeper Pub. Co. v. Swift*, 97 Fed. 290, 295.) The written agreement governs. (Sec. 2186, Civil Code.)

Third. This is an action in equity and it was the province and duty of the court to determine, from the evidence submitted, whether or not the plaintiff was entitled to succeed. The court determined, upon the evidence submitted, that she was not, and that the deed was an absolute deed. This concludes the matter.

Fourth. The construction of a contract is for the court. This being an action in equity, it was for the court to determine whether or not the plaintiff had supported the allegations of her complaint. It had a right to do this upon whatever evidence was introduced by the plaintiff. It was its province to determine whether or not a contract was proved. It could do this upon the evidence if the evidence were oral, or upon the evi-



dence if the evidence were partially oral and partially in writing. Its duty to determine and construe the contract and its authority to do so was always present, but it appears that the contract between the parties was in writing and the construction of that contract was peculiarly for the court. (3 Am. and Eng. Ency. of Law, 1st Ed., p. 867.)

An offer of performance is of no effect if the person making it is not able and willing to perform according to the offer. (Sec. 2030, Civil Code.) If there had been an offer, it was not within the time, but the transaction itself would not constitute any tender. It is necessary that there should have been a tender made before the action could be maintained, even though the deed could have been decreed a mortgage under the evidence. (25 Am. and Eng. Ency. of Law, p. 898.) Tender of the purchase money is a prerequisite to maintenance of a suit for specific performance of a contract to sell real property. (*Askew v. Carr*, 81 Ga. 685.) The tender must be made in good faith, and if it be shown that the party making the tender did not intend to deliver the money or property, if the tender had been accepted, the tender is bad. (*Fisk v. Holden*, 17 Tex. 408; Sec. 2030, Civil Code.) The money must be in the possession or under the control of the party making the tender. (*Steele v. Biggs*, 22 Ill. 643; *Ladd v. Mason*, 10 Ore. 208; *Herberger v. Husman*, 90 Cal. 583, 27 Pac. 428.) Mere readiness and willingness of a debtor to pay, without offering or tendering payment, is not sufficient. (25 Am. and Eng. Ency. of Law, p. 916.) It was necessary that there should be a tender or payment within said time; otherwise, the appellant had no right thereunder. (Sec. 2025, Civil Code; *Ide v. Leiser*, 10 Mont. 5; *Grey v. Tubbs*, 43 Cal. 359, 364; *Mason v. Payne*, 47 Mo. 517.)

The agreement from Jones and wife to the appellant was admissible in evidence. (Sec. 3130, Code of Civil Procedure; *Woodward v. Jewell*, 140 U. S. 247; *Housekeeper Pub. Co. v. Swift*, 97 Fed. 209; *In re Howard*, 100 Fed. 630; Sec. 2186, Civil Code.)

The fact that an absolute deed was executed and an instru-

ment giving the plaintiff an option to purchase within a certain time was executed and delivered at the same time, does not constitute the deed a mortgage. (*Gassert v. Bogk*, 7 Mont. 585, s. c. 149 U. S. 17, 13 Sup. Ct. 741; *Henley v. Hotaling*, 41 Cal. 22; *Reed v. Bond*, 96 Mich. 134; *Stahl v. Dehn*, 72 Mich. 645; *McMillan v. Bissell*, 63 Mich. 66; *Buse v. Page*, 32 Minn. 114, 19 N. W. 736; 1 Jones on Mortgages, Secs. 264, 265; *Cowell v. Craig*, 79 Fed. 685; *Schriber v. Le Clair*, 66 Wis. 579; *Hayes v. Care*, 83 Ind. 284; *Ganceart v. Henry*, 98 Cal. 281, 284, 33 Pac. 92.)

The criterion by which to determine whether the instrument is a deed, with an agreement to reconvey, or a mortgage, is whether there is a subsisting and continuing debt from the grantor to the grantee. (*Gassert v. Bogk*, *supra*; *Farmer v. Grose*, 42 Cal. 169; *Hickox v. Lowe*, 10 Cal. 197; *Page v. Volhac*, 42 Cal. 75; *Lodge v. Turman*, 24 Cal. 385; *Kuhn v. Rumpp*, 46 Cal. 299; *Montgomery v. Spect*, 55 Cal. 352; *Manassa v. Dinkelspiel*, 68 Cal. 404, 406; *Eaton v. Rocca*, 75 Cal. 93, 97; *Glover v. Payn*, (N. Y.) 19 Wend. 518; Warvelle on Vendors, p. 175, Sec. 130, Sec. 173.)

Time is of the essence of the contract. (*Cleary v. Folger*, 84 Cal. 316; *Magee v. McManus*, 70 Cal. 538; *Brink v. Steadman*, 70 Ill. 241; Warvelle on Vendors, Sec. 807; *Grey v. Tubbs*, 43 Cal. 364; *Reddish v. Smith*, 10 Wash. 178, 38 Pac. 1003; Warvelle on Vendors, Sec. 808; *Ide v. Leiser*, 10 Mont. 5; *Mason v. Payne*, 47 Mo. 517; *Knatt v. Stevens*, 5 Ore. 235; *Reynolds v. R. R. Co.*, 11 Neb. 186, 7 N. W. 737; *Barnard v. Lee*, 97 Mass. 92; *Kimball v. Cook*, 70 Ill. 553; *Mo. R. etc. R. Co. v. Brickley*, 21 Kan. 275; Warvelle on Vendors, Sec. 98; Civil Code, Sec. 2223.)

The contract, being clear in its terms, must speak for itself and cannot be explained by parol testimony. (*Blake v. Pine Mt. Iron & Coal Co.*, 76 Fed. 624, 654; Warvelle on Vendors, Sec. 114; Civil Code, Secs. 2200 *et seq*; Sec. 2186; Code of Civil Procedure, Sec. 3132.)

The evidence must be clear, specific and satisfactory, and of such a character as to leave in the mind of the chancellor no hesitation or substantial doubt. (*Wilson v. Harris*, 21 Mont. 374, 431; *U. S. v. King*, 9 Mont. 75, 78; *Gassert v. Bogk*, *supra*; *Jasper v. Hazen*, (N. Dak.) 23 L. R. A. 62, 63, and cases cited; Sec. 3132, Code of Civil Procedure.)

MR. COMMISSIONER POORMAN prepared the following opinion for the court:

This is an action to have a deed to certain real estate declared a mortgage, and for an accounting of the rents and profits. At the trial of the case the court sustained defendants' motion for a nonsuit, and entered judgment in favor of defendants. The plaintiff appeals from the judgment and from an order overruling her motion for a new trial.

1. It appears from the record that on the 11th day of May, 1898, John Noyes and wife, being then the owners of lot 2 in block 58 of the Butte townsite, leased the same to the plaintiff herein for the period of three years, and also in the lease gave the plaintiff an option to purchase the property for the sum of \$4,500, on condition that she comply with all the terms of the lease with reference to the payment of rent, and should make the payments specified in the option within the time therein stated, the last payment thereof being the sum of \$2,500, which was to be paid on or before the 11th day of May, 1901. Time was made of the essence of this agreement, and the lease as well as the option was to become null and void in case the lessee (appellant here) should fail to comply with the terms thereof. On May 4, 1899, Mrs. Morrison, the appellant here, became indebted to the respondent Jones in the sum of \$3,300, and as security for the payment thereof assigned to Jones this lease and option, with the agreement that Jones should have possession of the property, should rent the same, and account for the net proceeds arising therefrom. This indebtedness from Mrs. Morrison to Jones appears to have been increased, and on May 2, 1900, Mrs. Morrison executed and delivered to Jones, for a

consideration of \$5,089.80, a bargain and sale deed, by the terms of which she sold, assigned, transferred and conveyed to Jones and his heirs all of her right, title, interest, claim, demand, possession and right of possession of, in and to this property. This deed also makes specific reference to this lease and option which then existed between Noyes, the owner of the property, and Mrs. Morrison, and includes the lease in the conveyance. The deed then contains this further statement: "It is agreed and understood, that if said second party shall make the payments required under said lease and agreement from said John Noyes and his wife to the said first party and obtain a deed of conveyance for said premises, that the title thereby conveyed shall be and remain the property of said second party or his assigns, free from all claims and demands of the said first party, and all and every person claiming, or to claim through and under her." It is further specified in this deed that the grantor surrenders to the grantee, Jones, the right to the possession of the property, "and he shall henceforth be entitled \* \* \* to the same, and to receive the rents, issues and profits thereof without let or hindrance on the part of the first party or any person claiming under her." Concurrent with this deed a written agreement was entered into between the parties, by the terms of which Jones is declared to be the owner of this lease and agreement to convey, executed by Noyes to Mrs. Morrison, and Jones further agrees therein that he will assign this lease and option to Mrs. Morrison on condition that she pay to him the sum of \$5,089.80, together with interest, on or before the 14th day of May, 1901, provided this payment is made before Jones shall acquire a deed of conveyance from Noyes, but that, if Jones shall acquire the deed of conveyance from Noyes, then the amount required to be paid is the sum of \$5,089.80, plus \$2,500, besides the interest thereon, which payment shall be made before the 14th day of May. In the event this payment is made by Mrs. Morrison at any time prior to the 14th day of May, 1901, Jones agrees to account to her for the rents received from the premises from May 2, 1900.

The appellant contends that this deed is a mortgage. The rule adopted by this court for determining whether a deed absolute on its fact is a mortgage is that no conveyance can be a mortgage unless it is made for the purpose of securing the payment of a debt or the performance of a duty existing at the time the conveyance is made, or to be created or to arise in the future. (*Gassert v. Bogk*, 7 Mont. 585, 19 Pac. 281, 1 L. R. A. 240.)

The original indebtedness, as will be noticed, was \$3,300. The consideration expressed in this deed was \$5,089.80. A considerable portion of this consideration was therefore not included within the former agreement between the parties, and was not secured thereby. The test is whether the grantor in the deed sustains the relation of a debtor to the grantee. In the present case, could the grantee Jones, at any time after the execution of the deed, have successfully prosecuted an action against Mrs. Morrison to recover the consideration expressed in the deed? The written terms of the deed and the concurrent agreement appear to cover about every phase of the case, and negative any claim of indebtedness. Mrs. Morrison does not in either of these instruments agree in any manner to pay to Jones any sum whatsoever. There is nothing in either of these instruments that would give Jones any right of action against Mrs. Morrison, nor could he, under the terms of these instruments, maintain any action against her or compel her to pay him any sum whatsoever. There was, therefore, no indebtedness existing between these parties; hence there could be no mortgage; for if this instrument was a mortgage as to Mrs. Morrison, it was also a mortgage as to Jones, and, if a mortgage, there must have been an indebtedness. Being no indebtedness, there could be no mortgage. (*Gassert v. Bogk*, *supra*; *Martin v. Allen*, 67 Kan. 758, 74 Pac. 249; *Reed v. Parker*, 33 Wash. 107, 74 Pac. 61.)

It further appears from this record that Mrs. Morrisson did not pay Noyes the \$2,500 due under her option May 11, 1901, but that defendant Jones made this payment. If this instru-

ment was in fact a mortgage, and Jones had not made this payment to Noyes, the rights of both Mrs. Morrison and Jones would finally have terminated with respect to this property, and Mrs. Morrison would still be liable to Jones for this indebtedness, if it was an indebtedness, of \$5,089.80, with the interest thereon; but that indebtedness was canceled by the taking of this deed, as appears from the written agreement between the parties in this case.

The claim made by appellant that this deed is a mortgage cannot be sustained.

2. There is no evidence in this cause showing that any payment or tender was made to Jones within the time required by the terms of this written contract, or in fact that any tender whatsoever was made. The plaintiff's rights, if she had any, to enforce a conveyance, were therefore lost by her failure to comply with this written agreement.

3. It is further complained that the court improperly entered judgment decreeing this instrument to be a deed; that the same could not properly be done on a motion for nonsuit. This is strictly an equitable action, and the defendant may, if he chooses, at the close of plaintiff's case, submit the cause to the court for decision; and where the plaintiff's evidence fails to sustain the allegations of her complaint there is no inconsistency in the court's rendering judgment on the merits of the cause, so far as it is necessary for plaintiff to maintain the same to entitle her to recover. There is no such thing as technical nonsuit in a strictly equitable action.

4. The appellant claims, in his specification of errors, that the introduction in evidence of this concurrent agreement dated May 2, 1900, was error. This agreement was a part of the transaction between plaintiff and defendants respecting this property, and it was a proper matter to be inquired into by the court.

We recommend that the judgment and order appealed from be affirmed.

PER CURIAM.—For the reasons stated in the foregoing opinion, the judgment and order are affirmed.

MR. JUSTICE MILBURN, not having heard the argument, takes no part in this decision.

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GOODELL, APPELLANT, v. SANFORD ET AL., RESPONDENTS.

(No. 1,922.)

(Submitted June 13, 1904. Decided July 9, 1904.)

*Executors and Administrators—Sales—Nature—Discretion—Vendor and Purchaser — Objections to Title—Estoppel—Statute of Frauds—Declarations of Trust—By Whom Signed—Limitations—Written Instruments—Accrual of Actions—Set-Off—Date of Credit.*

1. Under Revised Statutes 1879, p. 233, Section 209, providing that, when authority is given in a will to sell property, the executor may sell without the order of the probate court, but must make a return of such sales as in other cases, and that no title passes until the sale is confirmed by the court, a private sale by an executrix under a power in the will to manage the estate as she should deem best, and for that purpose to sell any portion or the whole thereof, which is afterwards confirmed by the court, is not a judicial sale, but a sale under the power.
2. A will authorizing the executrix to manage the estate as she should deem best, and to sell any portion or the whole thereof, and to invest the proceeds as she should deem fit, empowered the executrix to convey real property to a trustee, who was to hold for a syndicate, which was to plat the same, and under the terms of which sale the purchase price, secured by a lien on the property, was made payable in installments.
3. In the ordinary contract of purchase and sale there is an implication that the conveyance to be made thereunder will transfer the title to the property, but, in the absence of any special agreement, it is incumbent upon the vendee to examine the title for himself, and to point out any objections he may have to the title tendered him by the vendor.
4. Beneficiary vendees under a trust agreement, who assented thereto for years, entered into possession, sold portions of the property, made payments on the price, and in all respects ratified the transaction between the purchasing syndicate, of which they were members, and the vendor, until sued for the balance of the price, were estopped from claiming that they received no title to the property, or that the sale, which was one by an executrix under a power, was irregularly made.

5. Under Compiled Statutes 1887, p. 651, Section 217, providing that no trust or power concerning lands shall be created or declared, unless by act of law or by deed or conveyance in writing subscribed by the party creating or declaring the same, and Section 219 (page 652), providing that contracts for the sale of lands shall be void unless some note or memorandum expressing the consideration be made in writing and subscribed by the party to whom the sale is to be made, where a trust in land was declared on behalf of the members of a syndicate by the grantee of the land to secure the payment of the price to the grantor, such grantee, in signing the declaration, acted as the agent of the parties to the syndicate, and they were bound by the declaration, although they did not sign it.
6. Under Compiled Statutes, Section 41, as amended by Session Laws 1889, p. 172, providing that an action on any contract or liability founded upon an instrument in writing shall be commenced within eight years, an action to enforce a liability evidenced by a declaration of trust, in which a complaint was filed within eight years after a certain payment under the declaration became due, was commenced in time.
7. An action on a trust agreement, which authorized the trustee to sell the interest of a defaulting party at public auction and apply the net proceeds of the sale upon the payment of the amount due from such defaulting party to plaintiff, and giving plaintiff an action against such defaulting party for the balance remaining due after such application, accrued when the trustee sold the property under the terms of the declaration of trust.
8. A setoff, made up of different items, should be credited as of the dates of the respective items.

*Appeal from District Court, Lewis and Clarke County; J. M. Clements, Judge.*

ACTION by Catherine M. Goodell, administratrix of Dwight T. Goodell, deceased, against John B. Sanford and C. G. Evans. From a judgment for defendants, plaintiff appeals. Reversed.

*Messrs. McConnell & McConnell, and Mr. Lewis Penwell, for Appellant.*

*Mr. Massena Bullard, for Respondents.*

MR. COMMISSIONER CALLAWAY prepared the following opinion for the court:

The plaintiff brought this action as executrix of the last will and testament of Dwight T. Goodell, deceased. Trial was to the court, which entered judgment for the defendants. The plaintiff has appealed. The questions presented arise upon the judgment roll, which includes a bill of exceptions containing so



much of the evidence as is necessary to elucidate the issues involved. The facts, in so far as they are necessary to a determination of the appeal, are substantially as follows:

The testator died December 31, 1888, leaving a will dated September 18, 1882, in which he appointed the plaintiff sole executrix. Paragraph "fourthly" therein reads: "I hereby authorize and empower my executrix, hereinafter named, to manage my said estate as in her judgment she shall deem best, and for that purpose to sell any portion or the whole thereof, whether real, or personal, or mixed, and to invest or use the proceeds thereof as she shall deem fit and proper, and no liability shall attach to her in any event for the exercise of the discretion here authorized." The will was admitted to probate, and letters testamentary thereupon were issued to plaintiff, prior to the occurrences hereinafter mentioned.

On May 28, 1889, the plaintiff, as executrix, sold at private sale certain real estate belonging to the estate to a syndicate, composed of the defendants (who acted throughout the transaction as the firm of Sanford & Evans) and eleven other persons, for \$50,000. The agreement seems to have been that the syndicate should pay one-fourth of the purchase price in cash, and the remainder in three equal installments, falling due June 12, 1890, June 12, 1891, and June 12, 1892.

On May 29, 1889, the plaintiff filed in the probate court a petition praying for the confirmation of the sale, in which she recited "that under and by virtue of said will power is given to your petitioner to sell all or any part of the real estate, hereinafter described, belonging to said estate, whenever and as to your petitioner may seem best and most to the interest of said estate," and also "that in pursuance of the power in said will contained, and deeming it for the best interest of the estate, your petitioner has sold the said premises at private sale, without notice, to George H. Hill, trustee, for the sum of fifty thousand dollars (\$50,000.00); that said sum was duly and legally paid, and, as your petitioner believes, the amount for which the same

has been sold is not disproportionate to the value of the property sold; and that a sum exceeding ten per cent of the purchase price in advance thereof, and excluding the expenses of a new sale, cannot be obtained for said property." Forthwith, upon the filing of the petition, the court made an order fixing June 10, 1889, as the time for hearing the petition. On June 11, 1889, there was also filed a written consent to the sale, signed by the heirs, in which they set forth that, whereas, the will provides, among other things, that the executrix, Catherine M. Goodell, might, "if she felt so disposed, at any time sell and dispose of any or all of the real estate hereinafter described for cash in hand, and invest the proceeds from such sale or sales as she thought best for the interest of the heirs of said estate; and, whereas, the said executrix is offered the sum of fifty thousand dollars for such realty, and upon the following terms and conditions, to-wit: Ten thousand dollars cash down upon delivering the deed to said property hereinafter described, and the further sum of forty thousand dollars to be paid in installments, to be secured by mortgage upon said property—and being desirous of disposing of said property," they therefore urgently requested the court to confirm the sale. Thereupon the court made an order confirming the sale, in which it is recited that, the executrix having made a return of her proceedings under the provisions of the last will and testament of the decedent, "and the court having examined said return and heard the testimony of witnesses in support thereof, and it duly appearing to the court that in pursuance of said power of sale said Catherine M. Goodell sold the following described property, \* \* \* that at such sale George H. Hill, trustee, became the purchaser of said real estate above described for the sum of fifty thousand dollars (\$50,000.00), being the highest and best bidder, and the sum being the highest and best sum for said property, \*

\* \* it is by the court ordered, adjudged and decreed that the said sale be, and the same is hereby, confirmed and approved, and declared valid, and that proper and legal conveyances of

said real estate are hereby directed to be executed to said purchaser by said Catherine M. Goodell, executrix."

On the next day, June 12th, the plaintiff executed a deed to George H. Hill, trustee, whereby she conveyed to him "all the right, title, interest and estate of said Dwight T. Goodell, deceased, at the time of his death, and also all the right, title and interest that the said estate, by operation of the law or otherwise, may have acquired, other than, or in addition to, that of said testator, at the time of his death, and all dower and right of dower of the said party of the first part, as the widow of said deceased or otherwise, in and to" the real estate in question.

During the month of June, 1889, all the members of the syndicate and Mrs. Goodell signed an instrument reciting the fact that on June 12, 1889, plaintiff had executed the said deed to George H. Hill, trustee, and directing Hill to convey the property to George B. Child, trustee. The signature of Sanford & Evans was written thereto by the defendant Sanford. Hill did as directed; his deed to Child, trustee, being dated August 5, 1889. On September 7, 1889, Child executed a declaration of trust, in which he acknowledged that the property was conveyed to him as trustee for the syndicate. The instrument sets forth the respective interests and liabilities of the several members of the syndicate therein, among which is found the following: "The said Messrs. Sanford & Evans own an undivided two-twentieths interest in the said property, and is indebted thereon to the said Catherine M. Goodell in the sum of three thousand seven hundred and fifty dollars (\$3,750.00)." The instrument then provides "that the said Catherine M. Goodell has a lien upon said property to secure the payment" of the sums due her according to the terms set forth therein. The three remaining payments are provided for as above stated, with interest payable annually. It is then certified that the trustee is to hold "the legal title in said premises for the said owners thereof, in the proportions or shares above specified, subject to the lien of the said Catherine M. Goodell, as aforesaid"; that

he is to plat the premises mentioned in the deed as a townsite, to sell the same, to execute deeds to the purchasers, to collect the money therefor, and out of the proceeds to first pay Catherine M. Goodell the amount due her, together with the interest thereon; and "if any payments to be made to the said Catherine M. Goodell as hereinbefore provided shall not be made within the respective times in that behalf above specified, either from the sales of property or from other sources, then and in such event the party failing to make such payment shall be deemed and held to forfeit all right, interest and estate of, in and to the said described property, and the undersigned shall thereupon reconvey to the said Catherine M. Goodell all of the interest in said property owned by the party making such default, and in such event the payments that may have been made by such defaulting party shall be forfeited to the said Catherine M. Goodell and retained by her as fixed, settled and liquidated damages, or, at the option of the said Catherine M. Goodell, the undersigned, instead of so reconveying such interest to her, shall sell the interest of said defaulting party at public auction to the highest bidder, and apply the net proceeds of such sale upon the payment of the amount due from such defaulting party, and the said Catherine M. Goodell shall have her action against such defaulting party for the balance remaining due from such defaulting party after making such application of payment. Said Catherine M. Goodell shall make her election under such option by giving notice to said defaulting party, which notice shall specify the course she elects to pursue, and if, within ninety days after receiving such notice, such defaulting party shall have failed to pay the full amount, principal and interest, then remaining due upon said indebtedness, the right of the said Catherine M. Goodell to demand a reconveyance or a sale of said property in the manner hereinbefore specified, in pursuance of her election, shall be absolute, and the undersigned shall proceed to reconvey or sell, as the case may be, upon the demand of said Catherine M. Goodell." To this declaration there was annexed a bond, which was given by Child to Mrs. Goodell in the

sum of \$20,000, with Erastus D. Edgerton and John B. Sanford as sureties. The bond recites the execution of the declaration, naming specifically Sanford & Evans, as well as other members of the syndicate, and was conditioned to the effect that the trustee should "well, truly and faithfully execute and perform all duties as such trustee." This declaration of trust and bond appear of record in Book 12, at page 41, in the office of the county clerk of Lewis and Clarke county.

Child continued to act as trustee for nearly six years. On April 25, 1896, the members of the syndicate, by an instrument in writing signed by them, requested Child, who had removed from Montana, to convey the property remaining in his hands to George F. Cope, trustee. The written request begins: "We, the undersigned, members of the syndicate named in a certain 'declaration of trust,' wherein George B. Child is trustee, said declaration of trust being of record in the office of the county recorder at Helena, Lewis and Clarke county, Montana, in Book 15, at page 41, to which reference is hereby made." The signature of Sanford & Evans to this paper the defendants admit to be genuine. In pursuance of this request Child, on July 31, 1896, conveyed the property to Cope, trustee. In this deed it appears that a considerable portion of the property conveyed to Child, trustee, in the year 1889, was thereafter sold, during the years 1889, 1890, 1891 and 1892, as parts of the "Hotel Park Addition." The sales of lots were made by the firm of Porter, Muth & Cox, which firm was a member of the syndicate; the proceeds being turned over to the trustee, Child. On July 14, 1898, the defendants were notified by plaintiff, through her attorney, that on November 16, 1894, they were indebted to plaintiff in the sum of \$1,666.53 on account of the purchase price of the property. The defendants did not deny but that the statement was correct, and did not give any testimony tending to show that they had paid any portion of said amount. They say they sold Mrs. Goodell goods, wares and merchandise aggregating \$156.41 during a period beginning May 1, 1894, and ending October 16, 1898, but say these sales did not apply upon the real

estate purchase, but, on the contrary, Mrs. Goodell still owes them for the goods, etc.

On December 16, 1898, the plaintiff notified the defendants that, as they had failed to comply with the terms of the declaration of trust, she elected to direct the trustee to sell their interest in the property at public auction to the highest bidder, and apply the net proceeds of the sale to the payment due from them; that, if there remained a balance due her after applying the amount obtained from the sale, she would commence an action against them for such balance. They were given ninety days to make the payment, according to the terms of the declaration of trust. To this notice the defendants paid no attention. Thereupon the trustee, in pursuance of his duty, sold the defendants' interest in the property at public auction. The sum of \$50 was realized therefrom, and the net proceeds thereof were applied upon the indebtedness. Thereupon this action resulted. The plaintiff asks judgment for \$1,575.83 and interest thereon at the rate of 8 per cent per annum from November 11, 1895, and for costs of suit. The transcript does not show when this action was begun, but the second amended complaint was filed April 16, 1900.

The defendants contend that, because of irregularities in the proceedings, there was no conveyance of title to them, and therefore there was no consideration for the transaction; consequently that no liability attaches to them; that the property was not sold to them, but was sold to Hill, trustee; that plaintiff never made a return of sale to defendants; that the court never confirmed any such sale as that alleged in the complaint; that the sale did not authorize the creation of a trust by the executrix. The most of these objections are purely technical.

In the first place, defendants err in assuming that the sale was a judicial one. It was not. It was a sale under the authority granted to plaintiff in the will. (*In re Pearsons*, 98 Cal. 603, 33 Pac. 451; *Id.*, 102 Cal. 569, 36 Pac. 934.)

Section 209, p. 233, Revised Statutes, 1879, which was in

force when the will was drawn, and presumably was in contemplation of the testator, provides : "When property is directed by the will to be sold, or authority is given in the will to sell property, the executor may sell any property of the estate without the order of the probate court, and at either public or private sale, and with or without notice, as the executor may determine; but the executor must make return of such sales as in other cases, and if directions are given in the will as to the mode of selling, or the particular property to be sold, such directions must be observed. In either case no title passes unless the sale is confirmed by the court." The same section was re-enacted in the Compiled Statutes (Section 209, p. 328), which were in force when the sale herein referred to was made.

*In re Pearsons*, 98 Cal. 603, 33 Pac. 451, the court said: "A sale by an executor under a power in the will is not a judicial sale, nor does the statutory requirement that no title shall pass until the sale be confirmed give to it the incidents of a judicial sale. \* \* \* The purchaser from an executor at a sale under a power in the will deals with him in making the purchase as he would with any other vendor. He makes the purchase subject to a confirmation by the court, but in all other respects he may incorporate in his contract of purchase the same terms and conditions as he would in dealing with any other agent for the sale of property, and he can repudiate his contract of purchase only for the same reasons as he could in case he had bought from another. The executor is regarded as the donee of a power (*Conklin v. Egerton*, 21 Wend. 436; *Newton v. Bronson*, 13 N. Y. 592, 67 Am. Dec. 89), and the sale is treated as if made under a power; and the purchaser is required to examine the sufficiency of this power, as he is that of any other power under which a sale may be made (*Larco v. Casaneuva*, 30 Cal. 561). In this state it is essential that the will shall have been admitted to probate before the power can have any validity (*Castro v. Richardson*, 18 Cal. 478), but in all other respects the contract of purchase and sale between the executor and his vendee is attended with the same incidents, and is to receive the same con-

struction as a similar contract between any other vendor and vendee."

In confirming a sale so made, "the scope of investigation by the court is limited to ascertaining whether the sale was legally made and fairly conducted, and the sum bid not disproportionate to the value of the property sold, and that a sum exceeding such bid at least ten per cent, exclusive of the expenses of a new sale, cannot be obtained." (Sections 2685, 2687, Code of Civil Procedure.) The court heard the proof adduced upon the return of plaintiff and confirmed the sale. It doubtless inquired into the terms thereof, and was satisfied that the sale was legally made and fairly conducted, the sum bid not disproportionate to the value of the property sold, and that a sum exceeding the bid as the statute requires could not be obtained. The sale as actually concluded was not the precise sale to which the heirs consented; but it was equally as advantageous to the estate, if not more so, and it complied substantially with the sale to which the heirs consented. The plaintiff reserved a lien upon the land sold, with a right to have the same reconveyed to her, retaining all payments theretofore made by the syndicate, or to have the interests of the vendees sold at public auction, with a right to sue them for the deficiency. The heirs have never objected to the proceeding so far as the record discloses, nor has any creditor. What effect the consent of the heirs had, or could have had, upon the court's action, is not perceptible, except that the court was thereby informed that the sale was not for cash, but was upon a partial payment, with the remaining payments secured.

The plaintiff had the right to make the sale in the manner she did under the terms of the will. A correct construction of paragraph "fourthly" therein leaves no doubt that a very wide discretion was left to plaintiff, and she does not appear to have transgressed it. (See *Huger v. Huger*, 9 Rich. Eq. 217; *Wright v. Zeigler*, 1 Ga. 324, 44 Am. Dec. 656; *Munson v. Cole*, 98 Ind. 502.)



No warranty of title was made by the plaintiff. "In the ordinary contract of purchase and sale there is an implication that the conveyance to be made thereunder will transfer the title to the property; but, in the absence of any special agreement upon the subject, it is incumbent upon the vendee to examine the title for himself, and to point out any objections he may have to the title tendered him by the vendor. (*Easton v. Montgomery*, 90 Cal. 307, 27 Pac. 280, 25 Am. St. Rep. 123.)" (*In re Pearsons*, *supra*.)

If defendants did not satisfy themselves of the title they were to get, it is their own fault. However, they have not shown us that they did not receive a perfect title, except as incumbered by their own contract. Their trustee entered into the possession of the property, platted a part of it into a townsite, sold portions thereof, and made payments upon the purchase price to plaintiff, all as he was empowered to do by the declaration of trust. Until defendants lost the property by foreclosure sale, all their acts, so far as the record discloses, were in direct affirmation of the trust agreement. The fact that they assented thereto for years, entered into possession of the property, sold portions thereof, made payments on the purchase price, and in all respects ratified the transaction between the syndicate and plaintiff, until sued for the balance of the purchase price due plaintiff, estops them from now saying they received no title, or that the sale was irregularly made. (*Harbin v. Levi*, 6 Ala. 399, 8 Smith's Con. Rep. 486; *Martin's Executor v. Truss*, 50 Ala. 95; *Adair v. Adair*, 78 Mo. 630; *Crumb v. Wright*, 97 Mo. 13, 10 S. W. 74; *Dupleix v. Deblieux*, 26 La. Ann. 218; *Lacy v. Johnson*, 58 Wis. 414, 17 N. W. 246; *Spinning v. Drake*, 4 Wash. 285, 30 Pac. 82, 31 Pac. 319; *Robertson v. Pickrell*, 109 U. S. 608, 3 Sup. Ct. 407, 27 L. Ed. 1049.)

The evidence discloses clearly that the syndicate first designated Hill as trustee, and the deed was made to him by plaintiff in accordance with direction of the members of the syndicate. Hill was connected with the First National Bank, and presum-

ably would keep the syndicate's money there. Edgerton, a member of the syndicate, was connected with the Second National Bank, and wanted the deposits. Through his influence Hill, trustee, was requested to convey the property to Child, trustee, and did so. Child executed the declaration of trust. This declaration was drawn by F. P. Sterling, Esq., attorney for the plaintiff. He testified that "there was a declaration of trust drawn, and it was entered into by all the parties interested." There seems to have been some difficulty in agreeing upon its exact terms. Sterling wrote and rewrote it seven or eight times, before it was finally agreed upon. To this declaration was attached the bond, conditioned for the trustee's faithful performance of his duties, and, as before stated, it was signed by Sanford, one of the defendants, as surety.

From the competent testimony in the record it is quite impossible to say that the defendants were not fully apprised, both in fact and in law, of the terms of the declaration of trust. Are they bound by its terms? When it was executed the Compiled Statutes of 1887 were in force. Section 217, p. 651, thereof, reads: "No estate or interest in lands other than for leases for a term not exceeding one year, or any trust or power over or concerning lands or in any manner relating thereto, shall hereafter be created, granted, assigned, surrendered or declared unless by act or operation of law, or by deed or conveyance in writing subscribed by the party creating, granting, assigning, surrendering or declaring the same, or by his lawful agent thereunto authorized by writing." Section 219, p. 652, thereof, reads: "Every contract for the leasing for a longer term than one year, or for the sale of any lands, or interest in lands, shall be void, unless the contract, or some note or memorandum thereof expressing the consideration, be in writing, and be subscribed by the party by whom the lease or sale is to be made." The land was conveyed to Child, trustee, by direction of all parties interested. Hill was a mere intermediary. Child executed the declaration as the grantee of plaintiff. In so doing he was the agent of all parties to the syndicate. He was the proper person

to make the declaration. To be charged by it, it was not necessary that the defendants should sign it. "When the trust is not created in and by the instrument of conveyance, it may be sufficiently declared and evidenced by the trustee to whom the land is conveyed, or who becomes the holder of the legal title; and this may be done by a writing executed simultaneously with or subsequent to the conveyance, and such writing may be of a most informal nature." (2 Pomeroy's Eq. Jur. Sec. 1007.)

A case much in point is that of *Lowber v. Connit*, 36 Wis. 182, in which it was claimed by counsel for defendant that a contract for the sale and conveyance of real estate was not binding upon defendant, because he did not sign it. The court said: "This question is practically decided adversely to this view in *Vilas v. Dickinson*, 13 Wis. 488. That was an action upon a bond for the conveyance of real estate, brought by the obligor against the obligee to recover a portion of the purchase money. The objection was taken that the obligation was signed by the plaintiff only, and therefore was not binding upon the other party. But the objection was overruled, the court holding that a party who accepts and adopts a written contract, although it is not signed by him, is bound by its terms and conditions. But it is insisted that under the statute of frauds the defendant is protected, because he did not sign the instrument upon which the action is founded, and which creates an estate in lands. Our statute in substance enacts that any contract for the sale of lands or of any interest therein shall be void unless the contract, or some note or memorandum thereof expressing the consideration, be in writing, and be subscribed by the party by whom the sale is made. Section 8, c. 106, Rev. St. The distinction between this provision and the English statute, which requires the contract to be signed by the party to be charged, is pointed out by the chief justice in *Dodge v. Hopkins*, 14 Wis. 631, 641, 648, and need not be dwelt upon here. See, also, *Hodson v. Carter*, 3 Chand. 234. The signature of the party who makes the sale satisfies this provision of the statute. But then the question arises whether the contract signed and delivered by the plain-

tiffs, and accepted and adopted by the defendant as the agreement between them, binds the latter. This can hardly be said to be an open question, certainly not after the rule laid down in *Vilas v. Dickinson*, which was an action at law." Further on the court said: "But it seems that the real foundation of the rule is that the party who accepts and adopts a written contract, though not signed by him, should be deemed to have fully consented to its terms and conditions, and is therefore bound by them. He ought not to be in a position where he can hold the other party to the contract, and compel its performance, if advantageous to him, and at the same time be at liberty to avoid the contract on his part, if disadvantageous. Both parties ought to be bound by the contract, or neither should be bound. And where the contract has been accepted and adopted by the party not signing it, he does assent and agree to it on his part, and the law implies a promise to perform." (And see *Ide v. Leiser*, 10 Mont. 5, 24 Pac. 695, 24 Am. St. Rep. 17.)

From what has been said, it follows that defendants were and are bound by the terms of a written instrument—the declaration of trust—to which they assented, and under which they acted for many years, and which they never sought to repudiate until the commencement of this action. This being true, the defendants' plea that the plaintiff's action is barred by the statute of limitations cannot be sustained. By Section 41 of the First Division of the Compiled Statutes of 1887, as amended (Session Laws of 1889, p. 172), which was in force when the declaration of trust was executed, it was provided that an action upon any contract, obligation or liability founded upon an instrument in writing shall be commenced within eight years. Section 512 of the Code of Civil Procedure is to the same effect. As before stated, the record does not disclose when this action was commenced, but the second amended complaint was filed within eight years after the payment of June 12, 1892, became due.

But, irrespective of the eight-year limitation, under the facts in this case, we think plaintiff's right of action against the de-

defendants accrued when the trustee sold the property under the terms of the declaration of trust. The sum for which plaintiff should have judgment is therefore but a mere matter of computation for the lower court. Plaintiff concedes that defendants are entitled to a setoff amounting to \$156.41. This latter sum is made up of several different items, which should be credited to defendants as of their respective dates.

We are of the opinion that the judgment and order should be reversed, and the cause remanded for further proceedings in conformity with this opinion.

PER CURIAM.—For the reasons stated in the foregoing opinion, the judgment and order are reversed, and the cause is remanded for further proceedings in conformity therewith.

MR. JUSTICE MILBURN, not having heard the argument, takes no part in this decision.

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MURRAY, RESPONDENT, v. CITY OF BUTTE, APPELLANT.

(No. 1,933.)

(Submitted June 18, 1904. Decided July 11, 1904.)

*Ejectment — Evidence — Stipulations — Effect — Appeal — Error Induced by Party—Harmless Error.*

1. Where plaintiff objected to the introduction of any evidence of conditions subsequent to a certain date, and his objection was sustained, he could not complain of the subsequent limitation of his own evidence to the showing of conditions prior to the date named.
2. A stipulation that certain streets within the boundaries of plaintiff's mining claim were used as public highways prior to the location of such claim, and had ever since been used as such, was, in effect, an admission by plaintiff of defendant's claim that the ground was occupied as a public highway at the time of the location of the claim.
3. Witness was asked whether he had any placer ground prior to 1875, and answered that he did not remember whether he bought a certain person out in 1875 or 1876. The court struck out the portion of the answer "concerning the buying of placer ground prior to 1875." Held, that the ruling was practically without meaning and harmless.

*Appeal from District Court, Deer Lodge County; Welling Napton, Judge.*

ACTION by James A. Murray against the city of Butte. From an order granting plaintiff a new trial, defendant appeals. Reversed.

*Mr. E. M. Lamb, and Mr. J. L. Templeman, for Appellant.*

We concede that an order granting or refusing a new trial on the ground of the insufficiency of the evidence will be reversed only for an abuse of discretion on the part of the trial court. (*Chauvin v. Valiton*, 7 Mont. 584; *Landsman v. Thompson*, 9 Mont. 189; *Kilby v. Baker*, 9 Mont. 399; *Falk v. Brown*, 13 Mont. 126; *Mattock v. Goughnour*, 13 Mont. 301; *Haggin v. Saile*, 14 Mont. 80.) And that such an abuse must be clearly shown. (*Murray v. Heinze*, 17 Mont. 356.) But at the same time we submit that conclusions of fact reached by a jury should have great weight, and should not be lightly cast aside by judicial action. (Constitution, Art. III, Sec. 23.)

Plaintiff must recover, if at all, on the strength of his own title, and not because of the weakness or want of title in defendant; and the burden rests upon the plaintiff to prove the title he asserts. (10 Am. and Eng. Ency. of Law, 2d Ed., 481; 17 Am. Dig., Century Ed., 1963; Newell on Ejectment, 354; *Farley v. Parker*, 4 Ore. 269.)

It is a well established rule in the action of ejectment that where both parties assert title from a common grantor and no other source, it is not usually necessary for the plaintiff to go back of the common source in order to prove title upon which he can recover. It is enough that he shows a better title through the common source than the defendant can show through the same source. (10 Am. and Eng. Ency. of Law, 2d Ed., 491, and cases cited.)

Possession is presumptive evidence of right and ownership. (*Hall v. Gittings*, (Md.) 2 Har. & J., 112; *Robertson v. Smith*, 1 Mont. 415; *Mason v. Park*, 4 Ill. (3 Scam.) 532.)

A grantor cannot, as against his prior grantee, convey more than such grantor has at the time of the conveyance, and the United States in this respect differs from no other grantor. (*Murray v. City of Butte*, 7 Mont. 68.)

The grant under which the defendant claims is the highest evidence of title. (*Northern Pac. Ry. Co. v. Majors*, 5 Mont. 111; *Murray v. City of Butte*, 7 Mont. 67.)

The burden of proving the legal title to the premises was on plaintiff. (*Fuller v. Worth*, (Wis.) 64 N. W. 995; *Rowland v. Updike*, 28 N. J. L. (4 Dutch.) 101; *Davis v. Davis*, 68 Miss. 478, 10 So. 70; *Hulsey v. Wood*, 55 Mo. 252; *Bohman v. Bishop*, 23 S. C. 96; *Bynum v. Gold*, 103 Ala. 427, 17 So. 667; *Bodenheimer v. Chesson*, 111 Ala. 539, 20 So. 364; *Rush v. French*, (Ariz.) 25 Pac. 816; *Wurts v. Mullen*, 6 Colo. 576; *Howard v. Lock*, (Ky.) 22 S. W. 332; *Owensboro, etc. R. R. Co. v. Barker*, (Ky.) 22 S. W. 444; *Murray v. Boisier*, (La.) 10 Mart. (O. S.) 293; *Mason v. Park*, 4 Ill. (3 Scam.) 532; *Daudt v. Harmon*, 16 Mo. App. 203; *Martin v. Kelley*, (Ky.) 30 S. W. 612; *Farley v. Parker*, 4 Oregon, 269.)

Defendant's present possession of the ground thus dedicated to public travel is presumptive evidence of ownership and right. (*Robertson v. Smith*, 1 Mont. 415; *Mason v. Park*, 4 Ill. (3 Scam.) 532.)

There is no doubt that public user—such as was commensurate with the needs and necessities of the inhabitants of Butte—of the ground covered by the streets and alleys in controversy prior to the inception of plaintiff's title, namely, April 16, 1875, was a sufficient acceptance under the congressional act of 1866 to preclude the passage of the legal title to the ground so covered by the streets and alleys to the grantees of the patent under which plaintiff claims. (*Murray v. City of Butte*, 7 Mont. 61; *City of Cincinnati v. White's Lessees*, 6 Pet. 431; *Smith v. Town of Flora*, 64 Ill. 93; *New Orleans v. United States*, 10 Peters, 661; Elliott, Roads and Streets, 2d Ed., Secs. 147, 149.)

Weighing all the testimony in this case and the presumptions and deductions in defendant's favor, it cannot be said that the jury was guilty of any irrational inference in arriving at its conclusions of fact. (*Griffith v. Dickens*, 2 B. Mon. 20; *Pater-son v. Hansel*, 67 Ky. (4 Bush.) 661; *Wall v. Hill's Heirs*, 40 Ky. (1 B. Mon.) 290; *Orr v. Haskell*, 2 Mont. 228.)

*Mr. James E. Murray, Mr. M. J. Caranagh, and Mr. H. P. Napton, for Respondent.*

It devolved upon appellant to show by pleading and to prove by a preponderance of evidence that the streets and highways claimed by them came within the purview of said act of congress; that is, that they were constructed upon public land not reserved for public use. It being necessary to prove this, they must allege it, and not having alleged it, they could not prove it, and the objection of respondent was improperly overruled (*Robinson v. Smith*, 1 Mont. 410.)

To come within the purview of the act of congress relied upon at the time the streets or highways were constructed, the land over which they were located must have been public land not reserved for other purposes. If the land had been located as placer, it was not public, and the fact that it was afterwards abandoned and was public when the Sinokehouse was located, would make no difference. The character of the land at the inception of the right claimed is determinate of the question, and the principle announced by this court, and the supreme court, in the case of *Belk v. Meagher*, applies here with equal force. Land is not public land while there is a valid location existing upon it, and any rights attempted to be initiated while such location is in case are void. (3 Mont. 65, 104 U. W. S. 279; *Robinson v. Smith*, 1 Mont. 410.)

Photos are competent evidence, and they constitute the best possible evidence of the physical appearance of conditions that have ceased to exist. (*Denver Elec. R. Co. v. Rolley*, (C. A. A.) 100 Fed. 738; *Kansas City R. Co. v. Smith*, 24 Am. St.



Rep. 753; *Bach v. Iowa Cent. R. Co.*, 112 Iowa, 241; *Williams v. Brooklyn El. Ry. Co.*, 32 N. Y. St. Rep. 702.)

A verdict given in the face of the instructions is contrary to law. (*King v. Lincoln*, 26 Mont. 157; *Murray v. Heinze*, 17 Mont. 353.)

Where a motion for a new trial is made on the ground of the insufficiency of the evidence to sustain the verdict, the motion is addressed to the discretion of the trial judge, and where there is a substantial conflict even, his order will not be disturbed. (*State v. Schnepel*, 23 Mont. 523.)

MR. COMMISSIONER POORMAN prepared the following opinion for the court:

This is an action in ejectment. Verdict and judgment were for defendant. Plaintiff moved for a new trial, which was granted, and the defendant appeals.

It appears from the record that the Smokehouse lode claim was located April 16, 1875; that the same is within the corporate limits of the city of Butte; that title to this claim, or an undivided interest therein, afterwards passed by mesne conveyance to this plaintiff; that in July, 1882, the plaintiff instituted this action, claiming to be the owner of the ground; that he had been ousted from the same by the defendant, who was then in possession. The action therefore appears to have been pending in the courts for about twenty-two years. The defendant disclaims any right to the possession of any part of the claim other than that conveyed to it by deeds, except its right to the use of that portion of the ground occupied by and used as streets and alleys, and alleges that this ground was so used and occupied prior to the location of this lode claim and under the Act of Congress of July 26, 1866, c. 262 (14 Stat. 251), giving the right of way for the construction of highways over public lands, etc.

At the trial of the action the plaintiff introduced evidence of his title, and of the rental value of the ground occupied by the

city, and rested. The defendant introduced evidence tending to show that the ground in dispute had been regularly laid out and used as streets and alleys of the town of Butte prior to April 16, 1875. Defendant also sought to show by evidence certain conditions existing and proceedings taken relative to the laying out of the townsite of Butte subsequent to that date. The plaintiff, however, objected to the introduction of any evidence along that line after April 16, 1875, and the court refused to admit the evidence. The case was then tried upon the theory that no evidence relative to conditions existing subsequent to April 16, 1875, was admissible.

The plaintiff in his rebuttal testimony sought to show certain conditions existing subsequent to this last-named date, but the court adhered to the former ruling which it had made in sustaining plaintiff's objection, and refused to admit the evidence. The court also refused to admit in evidence a photograph alleged to have been taken in October, 1875. The plaintiff assigned these rulings of the court as error, and the court granted a new trial.

It is evident that if it were error to refuse evidence tending to show conditions existing subsequent to April 16, 1875, the court was led into the error by the plaintiff; and as was said in *Newell v. Meyendorff*, 9 Mont. 254, 23 Pac. 333, 8 L. R. A. 440, 18 Am. St. Rep. 738: "A party in an action is bound by his pleadings. He is also bound by the rulings of the court which he obtains upon his own motion, and is estopped from claiming such ruling as error. (2 Herman on Estoppel, Sec. 823, and note.) A party is bound by his theory and presentation of his case. 'A party cannot get relief on one basis, and then seek a new chance to litigate, on the suggestion that he has a defense which he did not see fit to rely on before.'"

The photograph of defendant city taken in October, 1875, was offered in evidence. The court, in ruling thereon, said: "It may be introduced for the purpose of showing the condition of Butte prior to April 16, 1875." The plaintiff, however, refused

to put the photograph in evidence for this restricted purpose; showing conclusively that the object of the plaintiff was to show conditions existing subsequent to April 16, 1875. The plaintiff could not complain of the action of the court in limiting this evidence to the time named.

It was further alleged that the court erred in not rendering judgment for the plaintiff on the stipulation filed. This stipulation is to the effect that Broadway street, Park street, Main street and Granite street, within the boundary lines of what is known as the "Smokehouse Lode Mining Claim," were used as public highways prior to and at the time of the alleged location of the Smokehouse lode, and that the same have ever since been used as such. This stipulation was in effect an admission by the plaintiff of defendant's contention respecting the streets named therein, to-wit, that this ground was occupied as public highways at the time of the location of this mining claim.

It was further claimed by plaintiff that the court erred in striking out certain testimony of the witness Kroft relative to the existence of a placer claim on the ground in dispute. The question asked the witness was: "I will ask you if you had any placer ground within the limits of the Smokehouse lode location prior to 1875, or any other place?" To this question the witness replied: "I do not know when I bought Version out—whether it was in 1875 or 1876. I bought him out in that time." The defendant moved to strike out this answer as being incompetent and immaterial, and as being too indefinite as to time. The court made this ruling: "Strike out that portion concerning the buying of placer ground prior to 1875." Inasmuch as there was no evidence of the buying of any placer ground prior to 1875, the ruling of the court was practically without meaning and harmless.

It was further maintained by the plaintiff, in urging his motion for a new trial, that the evidence was insufficient to sustain the verdict. This claim cannot be sustained. Several witnesses on the part of defendant testified to the existence of these

streets and alleys prior to the location of the mining claim, and, while there was some evidence tending to show that some portions of some of the streets did not exist at that time, the variance is too slight to be regarded as a substantial conflict.

From the evidence presented in this record, but one conclusion can be reached, and that is embodied in the verdict of the jury. The evidence excluded was excluded in accordance with the theory of the case which the plaintiff himself had led the court to establish, and is therefore not error of which the plaintiff can complain.

We find no error in this record which would justify the court in setting aside the verdict of the jury and in granting plaintiff a new trial. We therefore recommend that the order granting the new trial be reversed.

PER CURIAM.—For the reasons stated in the foregoing opinion, the order granting a new trial is reversed.

MR. JUSTICE MILBURN, not having heard the argument, takes no part in the decision.

Rehearing denied September 30, 1904.

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STEWART, APPELLANT, v. HOFFMAN, RESPONDENT.

(No. 1,852.)

(Submitted March 29, 1904. Decided July 15, 1904.)

*Bankruptcy — Preference — Chattel Mortgage — Validity — Statute.*

1. Under Civil Code, Section 4401, a mortgage of personalty and transfer thereunder are void against a trustee in bankruptcy where the mortgage was made more than fourteen months prior to the transfer.

- 2 In an action by a trustee in bankruptcy to recover property of the bankrupt alleged to have been fraudulently transferred to defendant, where it appeared that the transfer was made within four months of the time the debtor was adjudged to be a bankrupt, and under a chattel mortgage having no validity under the laws of the state where the transfer was made, the trustee was entitled to judgment under Bankruptcy Act July 1, 1898, c. 541, Section 60, cl. "a," 30 Stat. 562; it appearing that the transfer was not to secure a present loan or advance, but one to pledge the payment of an old obligation, the effect of which was to enable the defendant to obtain a greater proportion of his debt than any other creditor of the bankrupt.

*Appeal from District Court, Gallatin County; Wm. L. Holloway, Judge.*

ACTION by W. R. C. Stewart, trustee in bankruptcy of Frank Rennie, against C. W. Hoffman. From a judgment for defendant, plaintiff appeals. Reversed.

*Mr. John A. Luce, and Mr. M. S. Gunn, for Appellant.*

*Mr. Eugene B. Hoffman, for Respondent.*

MR. JUSTICE MILBURN delivered the opinion of the court.

This is an appeal from a judgment entered in favor of the defendant. The plaintiff, at the time of the bringing of the action, was the duly appointed, qualified and acting trustee of the estate of one Frank Rennie, a bankrupt. Rennie, prior to August 11, 1899, and continuously from that date until the 14th day of March, 1901, was engaged in the business of a liquor dealer in the county of Gallatin. On that day he made, executed and delivered to the Bozeman National Bank his promissory note for \$1,800, on which he made certain payments, leaving a balance of about \$800. On February 6, 1901, he, being unable to pay his debts to numerous creditors, made a chattel mortgage of his saloon property, including a large number of articles, running to the defendant, C. W. Hoffman, to secure him, he having guarantied in writing the payment of said note to the bank. This mortgage was duly executed, and filed in the office of the county clerk. But on the 11th day of August, 1899, a

certain agreement in writing was made between Rennie and Hoffman, whereby it was attempted to secure the latter for such sum or sums of money as he might advance to pay the debts of Rennie. Rennie gave therein to Hoffman the right at any time prior to the full payment of the sums of money mentioned, or any other money advanced by Hoffman for him (Rennie), to take immediate possession without notice and without legal proceedings of all of said personal property, and sell and dispose of the same at such time or times and in such manner as to him might seem advisable, the proceeds of the sale first to be applied to payment of Hoffman for all moneys advanced to Rennie and for costs and expenses of taking, keeping and selling the property, the residue to be paid to Rennie.

It is noticeable that the defendant in his answer sets up that this agreement, which was made without formality, and was not filed in the office of the county clerk, was a chattel mortgage to secure him against loss or liability by reason of the written guaranty, whereas the writing itself discloses the fact, as above stated, that it was to secure him (Hoffman) for such sums of money as he might advance to pay the debts of Rennie. The defendant avers that this mortgage of the 6th of February was made "for the purpose and with the intent of extending said chattel mortgage of August 11, 1899, and the lien thereof, and putting the same in such form as to entitle it to record, so that notice of its existence might be given to all of the aforesaid creditors of said Frank Rennie."

On the 14th day of May, 1901, Rennie was, by order of the United States Court for the District of Montana, adjudged a bankrupt. It is alleged in the complaint that on the 14th day of March, 1901, Hoffman seized and took possession of all of said property of Rennie under and by virtue of the chattel mortgage—meaning the instrument of February 6, 1901. Defendant denied that the property was taken by him under or by virtue of the chattel mortgage last above mentioned, but avers that he took and seized the same on the 14th day of March, 1901, under

and by virtue of the authority conferred upon him in the instrument of August 11, 1899, for the purpose of securing himself against any loss by reason of his said personal guaranty, and not otherwise. It is admitted that there is still due by Rennie to the bank on the original agreement made with the bank a sum exceeding \$800. Possession of the property remained in Rennie until the 14th day of March, 1901, when it was taken by Hoffman, as above stated, except one or two articles of small value.

Plaintiff prayed for a decree that the chattel mortgage of February 6, 1901, be declared null and void as against the creditors of Rennie and against the plaintiff, and that Hoffman be required to surrender and deliver up to plaintiff all the property by him seized, and that, if any of said property could not be delivered, plaintiff have judgment for the value thereof, and that plaintiff have attorney's fees.

The case was tried to the court without a jury, and the court found, among other things, that on February 6, 1901, Rennie having reduced his indebtedness on the note to the bank which Hoffman had guarantied to \$800, with a small amount of interest, and being again pressed by creditors, gave to the defendant "another chattel mortgage," regular in form, for which no new consideration was passed, and that said instrument was intended as a continuation of the security given on August 11, 1899, and that Hoffman, on March 14, 1901, deeming himself insecure, took possession of the property under and by virtue of the instrument of August 11, 1899. The court found further that in April, 1901, proceedings were commenced against Rennie in the United States court, and that he was regularly adjudged a bankrupt, and plaintiff was appointed by the United States court as alleged; and that defendant turned over to plaintiff a portion of the goods in his possession, retaining sufficient to indemnify himself. As conclusions of law the court found, among other things, that the instrument of August 11, 1899, was a valid chattel mortgage as between the parties to it and as against all

persons except such as had brought themselves into privity with the property by acquiring a lien upon the specific property therein described; that defendant's taking possession of the property under his chattel mortgage of August 11, 1899, before any of Rennie's creditors had established a lien on the property, cured any defect which may have existed in the chattel mortgage; that the chattel mortgage of February 6, 1901, was a continuation of the security given defendant in the chattel mortgage of August 11, 1899; that the service of certain garnishment proceedings in suits by Rennie's creditors did not give them a lien on the property in controversy, and did not entitle them, or any of them, or the plaintiff, to contest the validity of the chattel mortgage of August 11, 1899; and that the plaintiff was not entitled to recover. Judgment was entered accordingly for the defendant. Plaintiff appeals.

Ten specifications of error are relied upon, but it is not necessary to consider more than one of them. Was the court correct in holding that the plaintiff was not entitled to recover a judgment? The property was seized by the defendant, according to his own statement, under and by virtue of the power contained in the instrument of August 11, 1899, it having remained in the possession of Rennie from the time of the making of the instrument until the time of its seizure. There was not any new consideration for the mortgage of February 6, 1901. Possession of the property was taken less than four months prior to the time that Rennie was declared a bankrupt under the bankruptcy act. At the time of the taking of said property it conclusively appears that Rennie was insolvent. The instrument of August 11th was not such as entitled it to filing under the laws of the state of Montana as a chattel mortgage. The insolvent, Rennie, owed considerable sums of money to other parties before the 14th day of March, 1901. There was not any fixed time mentioned in the "mortgage" of August 11, 1899. More than fourteen months had expired after August 11, 1899, before possession was taken under the instrument of that date, and the agreement was not executed and had not been executed up to the time



of the commencement of this action. The property of Rennie was turned over to the defendant less than four months before the bankruptcy. It was not a transfer to secure a present loan or advance, but one to pledge the payment of an old obligation, the effect of the transfer being to enable one creditor to obtain a greater percentage of his debt (to-wit, all of it) than any other. This is illegal, under Section 60 of the national Bankruptcy Act of 1898 (Bankr. Act July 1, 1898, c. 541, 30 Stat. 562 [U. S. Comp. St. 1901, p. 3445]), and the property may be recovered.

Section 60 of said Act is as follows: "(a) A person shall be deemed to have given a preference if, being insolvent, he has procured or suffered a judgment to be entered against himself in favor of any person, or made a transfer of any of his property, and the effect of the enforcement of such judgment or transfer will be to enable any one of his creditors to obtain a greater percentage of his debt than any other of such creditors of the same class. (b) If a bankrupt shall have given a preference within four months before the filing of a petition, or after the filing of the petition and before the adjudication, and the person receiving it, or to be benefited thereby, or his agent acting therein, shall have had reasonable cause to believe that it was intended thereby to give a preference, it shall be voidable by the trustee, and he may recover the property or its value from such person. \* \* \*"

Section 4491 of the Civil Code of this state is as follows: "Sec. 4491. Every transfer of personal property, other than a thing in action, or a ship or cargo at sea, or in a foreign port, and every lien thereon, other than a mortgage, when allowed by law, and a contract of bottomry or respondentia, is conclusively presumed, if made by a person having at the time the possession or control of the property, and not accompanied by an immediate delivery, and followed by an actual and continued change of possession of the things transferred, to be fraudulent, and therefore void, against those who are his creditors while he remains in possession, and the successors in interest of such creditors,

and against any persons on whom his estate devolves in trust for the benefit of others than himself, and against purchasers and incumbrancers in good faith subsequent to the transfer."

It thus appears that the instrument of August 11, 1899, and the transfer made on the 14th day of March, 1901, were not such as are allowed by the law of the state of Montana, and were such as attempted to give an unlawful preference to the defendant. Our conclusion, therefore, is that the judgment of the court below is wrong, and must be reversed.

*Reversed and remanded.*

MR. JUSTICE HOLLOWAY, being disqualified, takes no part in the foregoing decision.

Rehearing granted November 30, 1904.

#### ON REHEARING.

(Submitted March 13, 1905. Decided May 29, 1905.)

1. In an action by a trustee in bankruptcy to recover property of the bankrupt alleged to have been fraudulently transferred to the defendant, under a chattel mortgage executed more than fourteen months prior to such transfer and good between the parties to the instrument, where it appeared that the transfer was made within four months of the time when the debtor was adjudged a bankrupt, the trustee was not entitled to judgment under the provisions of the Bankruptcy Act of July 1, 1898 (Chapter 541, Sec. 60, cl. a, 30 Stat. 562), the delivery to, and taking by, defendant of the goods not having been unlawful under the laws of this state nor an unlawful preference under the Bankruptcy Act.
2. A mortgage not executed in manner and form as prescribed by law, is good between the parties.
3. There not being in this state any restriction placed by law upon the mortgaging of any species of personal property, all such mortgages are exempted from the operation of Section 4491 of the Civil Code, which provides that a transfer of certain personal property and every lien thereon, other than a mortgage "when allowed by law," is conclusively presumed to be fraudulent under certain circumstances, and the words "when allowed by law" are therefore superfluous.
4. In all matters pertaining to a construction of the United States Bankruptcy Act, the holdings of the Supreme Court of the United States are conclusive.

MR. JUSTICE MILBURN delivered the opinion of the court.

This case is before us for decision after rehearing. We are convinced that we were in error in our conclusion as announced in the opinion rendered heretofore.

We held that the instrument of August 11, 1899, and the delivery and taking of the property made on the 14th day of March 1901, were not such as are allowed by the law of this state and were such as attempted to give an unlawful preference to the defendant. Rennie was adjudged a bankrupt on the 14th day of May, 1901. Section 4491 of the Civil Code, cited heretofore, was adopted from California, as was declared in *Yank v. Bordeaux*, 23 Mont. at page 210, the section being identical with Section 3440 of the Civil Code of California. In the latter state there were at the time of the enactment of their Civil Code, certain kinds of personal property which it was not lawful to mortgage. This fact was overlooked by the codifiers of the Laws of Montana. In this state all personal property may be mortgaged; therefore, the words "when allowed by law," as appearing in our Section 4491, are superfluous. Disregarding the phrase "when allowed by law," all mortgages of personal property are exempted from the operation of the section. A mortgage not executed in manner and form as prescribed by law is good between the parties, as has been frequently declared by our court.

One ground upon which we decided that the delivery of the property to Hoffman was, in effect, to enable him to obtain a preference over other creditors, was that the delivery to him was not to secure a present loan or advance, but one to pledge the payment of an old obligation. Whatever views we had as to this, we are controlled by the utterance of the Supreme Court of the United States in *Sawyer v. Turpin*, 91 U. S. 114, 23 Lawyers' Co-op., p. 235. In all matters pertaining to a construction of the United States Bankruptcy Act, the holdings of the Supreme Court of the United States are conclusive. Our attention has been called pointedly to this Federal case upon rehearing, and we find that it is almost identical as to its facts

with the case before us, and Mr. Justice Strong, who wrote the opinion, is so clear, full and convincing in his argument and presentation of the facts and points that, were it not for the length of the opinion, it would be quoted in full herein. In it, as here, the question presented on appeal was whether the mortgage given by the bankrupt was a fraudulent preference of creditors within the prohibition of the Bankruptcy Act, and therefore void as against the assignee of the bankrupt. A bill of sale, understood by the parties to be a mortgage, was originally given for the protection of a pre-existing debt, and a formally executed mortgage covering the same property for the same purpose was given within four months immediately preceding the filing of the petition in bankruptcy. In that case it was admitted that the bankrupt was insolvent when the mortgage was made, and that the creditor had then reason to believe that he was insolvent. The petition in bankruptcy was filed on the 22d of October, 1869. On the 15th of May next preceding, the bankrupt gave the bill of sale to Turpin as security for a debt of \$27,839. The mortgage was dated July 31, 1869. The bill of sale was a conveyance absolute in its terms, having no condition or defeasance expressed, but was understood to be a security for the debt due. It was in substantial legal effect, though not in form, a mortgage. "Having been executed," as the court says, "more than four months before the petition in bankruptcy was filed, there is nothing in the case to show that it was invalid." It was not recorded and it was doubtful whether it was admissible of record. "No possession was taken under it by the vendee; but for neither of these reasons," the court remarks, "was it the less operative between the parties." It was within the power of Turpin to record it, and equally within his power to take possession of the property at any time before other rights against it had accrued. The court added that the Acts of Massachusetts, from which state the case came, did not prescribe when the record must be made or possession taken, remarking further, that when made or taken the instrument takes effect as against third persons as well as between the parties, from the time of its execu-

tion unless intervening rights have been obtained. The court cites *Mitchell v. Black*, 6 Gray, 100, in which case it was ruled by the Supreme Court of Massachusetts that one who has taken bills of sale of merchandise from a debtor as security for money advanced, and who had allowed the debtor to sell portions of the merchandise in the usual course of his business as if he were the owner thereof, might take possession of it at any time in order to secure his debt, and that such taking of possession, though at a time when the debtor was known by himself and the creditor to be insolvent, was effectual, notwithstanding the state insolvency law, which contained provisions very like those of the Bankruptcy Act. The court held unqualifiedly that the bills of sale, absolute as they were in terms, though in fact intended only as a security and though unattended by possession of the property, and though not placed upon record, vested a complete title in the creditor, subject only to be defeated by the discharge of the debt or by some intervening right acquired before the possession was taken. (See also *Humphrey v. Tatman*, 25 Sup. Ct. Reports, 567, decided April 17, 1905.)

In the case before us the taking of the goods related back for authority to the time of the giving of the power on August 11, 1899. The formal mortgage given February 6, 1901, is of no importance in this case, as it did not give or take away any right or power to or from Hoffman, but left him with what rights or power he had. The delivery to and taking by Hoffman of the goods was not unlawful under the law of Montana, and, under the authority of the *Sawyer-Turpin Case*, was not an unlawful preference under the Bankruptcy Act. The Federal Supreme Court says the giving of the formally executed mortgage was a "mere exchange in the form of the security" and that the preference, if any, was obtained when the bill of sale was given long before. In the case at bar here, there was a change in the form of the security, or, as the lower court found, the formal mortgage was a continuation of the original security. The preference, if any, was as of August 11, 1899.

The judgment of the court below is affirmed.

*Affirmed.*

MR. JUSTICE HOLLOWAY, being disqualified, takes no part in the foregoing decision.

## CASES DETERMINED

IN THE

**AT THE**

OCTOBER TERM, 1904.

THE HON. THEO. BRANTLY, Chief Justice.

THE HON. GEORGE R. MILBURN, } Associate Justices.  
THE HON. WILLIAM L. HOLLOWAY, }

**COMMISSIONERS:**

HON. JOHN B. CLAYBERG,  
HON. LEW. L. CALLAWAY,  
HON. W. H. POORMAN.

**PAXTON, APPELLANT, v. WOODWARD, RESPONDENT.**

(No. 1,913.)

(Submitted July 9, 1904. Decided October 12, 1904.)

*Label—Construction of Language — Justification — Answer—  
Complaint — Sufficiency—Malice — Damages—Jury Ques-  
tion — Evidence — Admissibility — Instructions — Appeal  
—Constitutional Law.*

31	195
33	501
31	195
40	409

1. To publish by a written unprivileged charge of an individual falsely that he is a common liar is libelous *per se*.
2. In arriving at the sense in which alleged libelous language is employed it is proper to consider the cause and circumstances of its publication and the entire language used.
3. Where an imputation complained of is a conclusion from certain facts, a plea of justification averring the existence of a state of facts which warrants the inference of the charge is sufficient.
4. When the publication is libelous *per se*, the plaintiff may recover general damages without allegations or proof of special damages.
5. Under Section 751, Code of Civil Procedure, when the words are unequivocal in their import and obviously defamatory, it is not necessary to employ colloquium or innuendo to explain their application and meaning; but if the words be of doubtful significance, or derive their libelous character not from their own intrinsic force, but from extraneous facts, it is necessary to allege the meaning intended, or set forth such extraneous facts by proper averments.
6. To say of a school teacher that he is "noted," though used in an invidious sense, and, referring to a particular district, "has done more damage and less good than any other teacher," and, referring to his application for a position as teacher of its school, "this district knows when it has had enough, so it turned the gentleman down," cannot be said to impeach him in any of those qualities which are essentials of an accomplished school teacher, and is not libelous *per se*.
7. In an action for libel, the existence of malice is not a necessary ingredient to entitle plaintiff to recover.
8. In an action for libel malice becomes material only as a circumstance affording a basis for increasing or diminishing the amount of recovery and in cases involving the defense of privileged publication.
9. In an action for libel, where malice is shown, exemplary damages may be added to the compensatory damages.
10. Malice is an inference of fact, which the jury may draw from a libelous publication alone.
11. In an action by a school teacher for libel, evidence that defendant, after the publication of the alleged libel, had tried to have the certificate of plaintiff as a school teacher revoked, is admissible to show malice, but not as a basis for extra compensation.
12. In an action by a school teacher for libel, proof of statements made by defendant after the institution of the suit to the effect that he would take away plaintiff's license as a teacher is admissible to show malice, but not as a basis for extra compensation.
13. In an action for libel it is not error to allow the defendant, as a witness, to be interrogated with respect to his motive in using certain language in the article alleged to be libelous, and to permit him to explain statements therein—whether they were true, and as to the source of his information with respect to their truth—where such facts are involved in the issues presented by the pleadings.
14. Where the instructions given incorporate the substance of those requested, it is not error to refuse to adopt them.
15. An instruction setting forth a clear and concise statement of the nature of the case and the issues to be determined is not objectionable.
16. In an action for libel where there is no suggestion in the complaint that plaintiff was damaged as an individual, but only that the injury was to him in respect to his profession, there can be no recovery of damages to plaintiff as an individual.



17. Where a false and unprivileged publication possessing the ingredients that stamp it as libelous *per se* is established, injury is presumed to ensue therefrom, and affords ground for the allowance of at least nominal damages.
18. While the Constitution, Article III, Section 10, provides, among other things, that in all suits and prosecutions for libel the jury shall determine the law as well as the facts, under the direction of the court, yet, it being the duty of the court to give the jury a correct declaration of the legal principles involved, an erroneous instruction to the prejudice of plaintiff is cause for reversal.

MR. JUSTICE MILBURN dissenting in part.

*Appeal from District Court, Gallatin County; Wm. L. Holloway, Judge.*

ACTION by Cyrus Paxton against A. J. Woodward. Judgment for defendant, and from the judgment and an order denying a new trial, plaintiff appeals. Reversed.

*Mr. John A. Luce, for Appellant.*

The purported justification to the second cause of action was certainly no justification whatever. It purported to refer to and make a part of said justification, defendant's second answer to plaintiff's first cause of action. Such matter could not be incorporated by reference. Each count of the answer must stand or fall by itself. Matters of substance cannot by reference be deemed a part of another count, although matters of inducement may. (*Curtis v. Moore*, 15 Wis. 135, Opin. 137-138; *Catlin v. Pedrick*, 17 Wis. 88, Opin. 92; *Nelson v. Swan*, 13 Johnson, 483-484; *Frazee v. Frazee*, 70 Ind. 411; 1st Ency. Pleading and Practice, 852.)

A justification must show all the facts and must meet the points in the sense in which the language was used. (*Wachter v. Quenzer*, 29 N. Y. 547; *Skinner v. Powers*, 1 Wend. 451.)

The charges must be met directly, and not argumentatively, and according to the sense given to them by the plaintiff. (*Fidler v. Delavan*, 20 Wend. 57.)

And it must be as broad as the libel. (*Brooks v. Bemiss*, 8 Johns. 455; 18 Am. and Eng. Ency. of Law, 2d Ed., 1069-

1070, and cases cited; 13 Ency. of Pleading and Practice, 84, 85 and 86, and cases cited.)

In order to constitute a justification, it is not enough to state facts which only tend to establish the truth of the charge. (*Thrall v. Smiley*, 9 Cal. 530, Opin. 536; *Merk v. Gelzhaeuser*, 50 Cal. 631.)

"Where the imputation complained of is a conclusion or inference from certain facts, the plea of justification must aver the existence of a state of facts which will warrant the inference of the charge." (Newell, Defamation, Slander and Libel, p. 652; *VanNess v. Hamilton*, 19 Johns. 349.)

"It is a familiar principle that words not actionable without proof of special damage may become so if spoken of one engaged in a particular calling or profession; the rule being that any words spoken of a person in his office, trade, profession, business or means of getting a livelihood, which tend to expose him to the hazard of losing his office or which charge him with fraud, indirect dealings or incapacity, and thereby tend to injure him in his trade, profession or business, are actionable without proof of special damage, even though such words, if spoken or written of an ordinary person, might not be actionable *per se*." (18 Am. and Eng. Ency. of Law, 2d Ed., 942, 943, and numerous cases there cited.)

"Words are to be held actionable *per se* which convey an imputation upon one in the way of his profession or occupation, and in such case there need be no averment of special damages." (*Morasse v. Brochu*, 151 Mass. 567, 25 N. E. 74, Opin. 77; *Graeter v. Hogan*, 2 Ind. App. 193, 28 N. E. 209; *Quigley v. McGee*, 12 Ore. 22, 5 Pac. 347; *Haynor v. Cowdon*, 27 Ohio St. 292, Opin. 295; *Watson v. Trask*, 6 Ohio, 532-533.)

"At common law there was no redress for defamatory words unless they impute a crime, or relate to a man's trade or profession, or cause some special damages." (*Davis v. Sladden*, 17 Ore. 259, 21 Pac. 140, Opin. 141; *Demorest v. Haring*, 6 Cow. 76; *Bank v. Thompson*, 18 Abb. Pr. 413.)

The pleading of the truth of the libel and the other matters in the plea of justification and the failure of defendant to prove the truth of the same was evidence of malice. (*Jackson v. Stetson*, 15 Mass. 48; *Fero v. Ruscoe*, 4 N. Y. 162, Opin. 165; *Chamberlin v. Vance*, 51 Cal. 75; *Westerfield v. Schripps*, 119 Cal. 607, 51 Pac. 958; 18 Am. and Eng. Ency. of Law, 2d Ed., 1006, and cases cited.)

The language itself shows that it was made with malice and that the defendant was actuated by improper and unjustifiable motives and malice was to be presumed. (4 Wait's Actions and Defenses, title of Malicious Intent, pp. 288 to 291, and cases cited.)

"In an action for libel or slander, evidence that the defendant either before or after the publication or utterance of defamatory words, threatened to ruin, injure or expose the plaintiff is admissible as indicating the presence of malice." (18 Am. and Eng. Ency. of Law, 2d Ed., 1006, 1094-1095, and cases cited; *Beals v. Thompson*, 21 N. E. 959; *Faxon v. Jones*, 57 N. E. 359; *Harris v. Zanone*, 93 Cal. 59, 28 Pac. 845, Opin. 847; *Odjer's Libel and Slander*, 296-310; see further, 18 Am. and Eng. Ency. of Law, 2d Ed., 1009, and cases cited, and 1010; *Westerfield v. Schripps*, 51 Pac. 959; *Skinner v. Powers*, 1 Wend. 451; *Mowry v. Raabe*, 89 Cal. 606; *Sheehey v. Cokley*, 43 Iowa, 183.)

Written words imputing want of veracity are actionable without proof of special damages. (18 Am. and Eng. Ency. of Law, 2d Ed., p. 921.) So were the other charges against the plaintiff all actionable *per se*. (4 Wait's Actions and Defenses, 282, 283, 284, 285, 286, 287, and cases cited; *Swan v. Thompson*, 56 Pac. 878, Opin. 880; *Upton v. Hume*, 33 Pac. 810; *Tonini v. Cevalasco*, 46 Pac. 103, Opin. 105; 3 Sutherland on Damages, 640, 641, 642, 343-347.)

Section 45 of the Civil Code of California is word for word the same as Section 32 of our Civil Code. The language being libelous *per se*, it was not necessary to allege or prove special

damages. (*Republican Publishing Company v. Conroy*, 38 Pac. 423; *Fenstermaker v. Tribune Publishing Company*, 45 Pac. 1097; *Turner v. Hearst*, 107 Cal. 262, 115 Cal. 394; *McDonald v. Woodruff*, 2 Dill. 248; *Eber v. Dunn*, 12 Fed. 526.)

The fact that special damages were alleged in aggravation of damages would not preclude the plaintiff from recovery, in this case, of general damages or of exemplary damages. The falseness of the charges against the plaintiff was sufficient ground for the allowance of exemplary damages. (*Bergman v. Jones*, 94 N. Y. 51, Opin. on p. 62 and cases cited; *Faxon v. Jones*, 176 Mass. 206, 57 N. E. 351; 18 Am. and Eng. Ency. of Law, 2d Ed., 1091, 1092, 1093, 1094, 1095, and cases cited; *Westerfield v. Schripps*, 119 Cal. 607, 51 Pac. 958; *Marble v. Chapin*, 132 Mass. 225; *Sutherland on Damages*.)

Substantial damages may be awarded though no actual injury is shown. (*Odjer's Slander and Libel*, 543; *Bradley v. Cramer*, 66 Wis. 298, Opin. 304; *Whittemore v. Weiss*, 33 Mich. 348.)

*Messrs. Hartman & Hartman*, for Respondent.

It is very evident that this language is not libelous *per se* except because it was alleged to have been spoken with reference to plaintiff's profession and occupation of school teacher, and it is only claimed to have been libelous in the complaint because it had a tendency to injure him in and did injure him in his said profession. But such language must "touch him in his profession." It must charge lack of the special learning necessary, ignorance of his duties, lack of ability, want of skill or knowledge, in order to be actionable *per se* and entitle him to recover without proof of special damages. (*Newell on Slander and Libel*, pp. 181, 182, 189, 191, Sec. 30, 197, Notes 8 and 9.) It is not libelous *per se* to say that a man is a liar, or that he has lied, or even that he has sworn to a lie, unless it appears that he has so sworn in judicial proceedings. (*Newell on Slander and Libel*, pp. 121 to 123, page 125, and on page 127, Notes 7, 8, 13 and 17, pp. 102, 103, 106, Note 2; *Studdord v. Trucko*.)

31 Ark. 726.) And, indeed, one might be a liar and yet a very able and efficient school teacher. We submit that these words did not "touch the plaintiff in his profession," and they are not shown to have been spoken of him in relation thereto. They do not impeach either his skill or his knowledge or his professional conduct. We take this to be the rule, where the action is for damages to the calling of plaintiff. (Newell on Slander and Libel, pp. 168, 169, 174, 175, 176.) They are clearly not actionable *per se* within the rule laid down by the same author on pages 181, 182, 186, 187, 189, 191 and 192. In order to make them libelous as touching the plaintiff in his profession, there should have been a colloquium or innuendo or both pointing out the manner in which they so touched and injured him. (*Legg v. Dunleavy*, 80 Mo. 558, 50 Am. Rep. 512; *Petsch v. St. Paul Dispatch Printing Company*, 41 N. W. 1034.)

We submit that the portions of the answer criticised show clearly that the allegations of the answer to the first cause of action so incorporated by reference in the answer to the second cause of action above quoted, clearly appear to be matters of inducement and not matters of substance. Therefore conceding the rule to be as counsel contends, it is complied with. But, while the rule in some states, notably in Wisconsin, is as appellant insists, it is not so in the majority of the states; and in California and others it is held that, where there are several causes of action in the pleading, it is not necessary to repeat at length the allegations of the first count in any subsequent count, but it is sufficient to refer to them specifically and state that they are to be taken as part of the second cause of action or defense as was done in this case. (*Trewekk v. Howard*, 105 Cal. 434; *Green v. Clifford*, 94 Cal. 49; *Hutson v. King*, 95 Ga. 271; *Dorr v. McKinley*, 91 Mass. 359; *Roeckler v. Railway Company*, 10 Mo. App. 448; *Courtis v. Bellknapp*, 21 Vt. 433; 2 *Estee's Pleading*, §§cs. 3641, 3642.)

The fact that the defendant believed the charges alleged to be libelous, to be true, is proper to be alleged and proved in miti-

gation of damages. (*Fountain v. West*, 23 Iowa, 9, 92 Am. Dec. 405; *Wozelka v. Hettrick*, 93 N. C. 10.)

It has been held that absence of malice combined with probable cause of belief of defendant that his words were true may constitute a defense and malice will not necessarily be presumed. (*Lester v. Corley*, 45 La. Ann. 1006, 13 South. 467.)

Evidence of general reports, that the plaintiff is guilty of an imputed offense is admissible in mitigation. (*Mapes v. Weeks*, 4 Wend. 659; *Nelson v. Evans*, 12 N. C. 9; *Fuller v. Dean*, 31 Ala. 654; *Gray v. Ellzroth*, (Ind.) 37 N. E. 551.)

It has been held in Louisiana that where the words were uttered when the parties were engaged in mutual villification and abuse that the plaintiff cannot recover. (*Fulda v. Caldwell*, 9 La. Ann. 358; *Goldberg v. Dobertwon*, 28 L. R. A. 721, 46 La. Ann. 1303; *Commonwealth v. Paritt*, 2 Del. Co. R. 16.)

The fact that the libel was published under a conviction of its truth arising from probable grounds of suspicion known to defendant at the time of publication, or that it was an honest effort though false to repel an accusation made by plaintiff against defendant, or that he honestly and in good faith believed the charge, may all be shown in mitigation of damages. (*Morris v. Lachman*, 68 Cal. 109; *Shattuc v. McArthur*, 29 Fed. 136; *Negley v. Farrow*, 60 Md. 158, 45 Am. Rep. 715; *Williams v. Miner*, 18 Conn. 464; *Fountain v. West*, 23 Iowa, 9, 92 Am. Dec. 405; *Shipp v. Story*, 68 Ga. 47; *Thompson v. Powning*, 15 Nev. 195.)

The defendant may allege and prove prior publications by the plaintiff of a provoking nature in mitigation, and may show generally that the publication was published under provocation although the circumstances of provocation may not be sufficient to justify it. (*Shattuc v. McArthur*, 25 Fed. 133; *Thomas v. Dunaway*, 30 Ill. 373; *Freeman v. Tinsley*, 550 Ill. 497; *Duncan v. Brown*, 54 Ky. 186; *Newman v. Stien*, 75 Mich. 402, 42 N. W. 956; *Knott v. Burwell*, 96 N. C. 272, 2 S. E. 588.)

Where the innuendo attaches a meaning to the language not necessarily arising from it, the justification may allege that by

the demeanor and conduct of the plaintiff at the time the language was used, it was understood to be used in the sense set out in the innuendo. (*Grubb v. Elder*, (Kan.) 72 Pac. 790.)

The complaint in the second cause of action did not state facts sufficient to constitute a cause of action, in that the words therein set forth were not actionable *per se*, even when spoken concerning the plaintiff's reputation as a school teacher, unless special damage had been caused thereby, and no special damages were pleaded. (Newell on Slander and Libel, pp. 176, 186, 181, 189, 182; *Footte v. Brown*, 8 Johns. 64; *Oakley v. Farrington*, 1 Johns. Cases, 130; *Angle v. Alexander*, 1 Bing. 119; *Lanchaster v. French*, 2 Str. 797; *Cotes v. Kettle*, Cro. Jac. 204; *Doyler v. Roberts*, 3 Bing. N. C. 835; *Brady v. Youlden*, Kerferd & Box's Digest, 709; *Ayre v. Craven*, 2 A. and E. 2; *Dooling v. Budget Pub. Co.*, 10 N. E. 809.)

Under our Constitution in all suits and prosecutions for libel the truth thereof may be given in evidence, and the jury under the direction of the court shall determine the law and the facts. (Constitution, Art. III, Sec. 10; Newell on Slander and Libel; *People v. Seeley*, 72 Pac. 834; *Van Vactor v. Walkup*, 46 Cal. 124; *English v. English*, 9 Ohio Dec. 167; *Bradley v. Cramer*, (Wis.) 48 Am. Rep. 311; *Dicken v. Shepherd*, 25 Md. 399; *Skinner v. Grant*, 12 Vt. 456; *Downing v. Brown*, 3 Colo. 571; *Thompson v. Grimes*, 5 Ind. 385; *Nye v. Otis*, 8 Mass. 122; *Thompson v. Powning*, 15 Nev. 195; *Gibson v. Williams*, 4 Wend. 320; *Maynard v. Beardsley*, 7 Wend. 560; *Dolloway v. Turrill*, 26 Wend. 383; *Railway Co. v. McCurdy*, (Pa.) 60 Am. Rep. 363; *Nott v. Stoddard*, (Vt.) 88 Am. Dec. 633.)

The objection to the admission of the publication of August 24, 1901 (which was the basis of the second cause of action), was that the court, having excluded any evidence thereunder, it was immaterial and that it only constituted evidence of defamation subsequent to the alleged libel set out in the first cause of action, and the authorities sustain the correctness of this ruling. (*W. & B. R. Co. v. Quigley*, 62 U. S. 202; *DeWitt*

v. *Greenfield*, 5 Ohio, 225; *Skinner v. Robertson*, 4 Yeates, 375; *Taylor v. Sturginger*, 2 Mill Const. 367.)

The exclusion of admissible evidence is harmless where the fact involved is established by other evidence. (*Garwood v. Wood*, 34 Cal. 248; *Kelley v. Fitzell*, 65 Cal. 87; *Smith v. Raymer*, (Colo.) 40 Pac. 151; *Clement v. Brown*, 30 Ill. 43; *Bull v. Griswold*, 19 Ill. 631; *Hand v. Kidwell*, 92 Ind. 409; *Doolittle v. Railroad Co.*, 20 Kan. 329; *Town v. Town*, (Mass.) 29 N. E. 639; *Kilbourn v. Fury*, 26 Ohio St. 153; *Jackson v. Sharf*, 1 Ore. 246; *Lucas v. Brooks*, 85 U. S. 436; *Beshoar v. Robards*, (Colo.) 45 Pac. 280.)

Where the evidence excluded would not, with the other evidence of the case, have entitled plaintiff to recover, the exclusion of such evidence is harmless, as is the case here. (*Downing v. Hollett*, (Colo.) 40 Pac. 505; *Indianapolis F. & M. Co. v. Herkimer*, 46 Ind. 142.)

Neither is the exclusion of proper evidence prejudicial error where it appears that, if admitted, it would not have benefited the party offering the evidence, which also appears in this case. (*Mills v. Los Angeles*, 90 Cal. 522; *Meyer v. Krohn*, 114 Ill. 574; *Hobart v. Plymouth*, 100 Mass. 159.)

Nor will the verdict be disturbed because of the exclusion of proper evidence where it does not appear that the party was injured thereby, as it does not here. (*Dexter v. Harrison*, (Ill.) 34 N. E. 46; *Whitaker v. Voorhees*, 38 Kan. 71, 15 Pac. 874; *Smith v. Collins*, 115 Mass. 388.)

Nor is the exclusion of admissible evidence which could not, if received, have changed the result (as it evidently could not in this case), reversible error. (*Gregg v. Moss*, 81 U. S. 564; *Delger v. Johnson*, 44 Cal. 182; *Root v. Curtis*, 38 Ill. 192; *Ryan v. Donley*, 71 Ill. 100; *Fire Insurance Co. v. Cary*, 83 Ill. 453; *Shipley v. Shook*, 72 Ind. 511; *Moore v. Lynn*, 79 Ind. 299; *Baker v. Carr*, 100 Ind. 330; *Litsey v. Moffett*, 29 Kan. 507; *Cowles v. Merchants*, 140 Mass. 377; *B. & B. M. Co. v. Sloan*, 16 Mont. 97; *Hart v. Johnson*, 6 Ohio, 87; *Box v. Kelso*, (Wash.) 31 Pac. 973.)



Where, in an action for libel, defendant is found not guilty of libel in publishing the article set forth in the complaint, the exclusion of other articles than those set out, offered for the purpose of showing malice, is harmless error. (*Phoenix Ins. Co. v. Stewart*, 53 Ill. App. 273; *Morse v. Morse*, 25 Ind. 156.)

Newell on Slander and Libel, page 152, lays down the rule as follows: "The damage must be the immediate consequence of the defamatory words and must be attributable wholly to the words, so that, where the reason of a person's refusing to employ the plaintiff was founded partly on the defendant's words, and partly on the circumstances of his having been previously discharged by another master, it was held that no action was maintainable." Other libels or slanders than the one sued on are not grounds of damage for which compensation may be awarded. (*Ward v. Dick*, 47 Conn. 300, 36 Am. Rep. 57; *Throgmorton v. Davis*, 4 Blackf. 174; *Markham v. Russell*, 94 Mass. 573; *Van Derreer v. Sutphin*, 5 Ohio St. 293; *Chamberlain v. Vance*, 51 Cal. 75; *Schoonover v. Rowe*, 7 Blackf. 202; *Root v. Loundes*, 41 Am. Dec. 762.)

The repetition or republication of the libel cannot be made an extra element of damages for which compensation may be awarded. (*Ward v. Dick*, 36 Am. Rep. 57; *Ransom v. McCurley*, 140 Ill. 626, 31 N. E. 119; *Meyer v. Bohlfig*, 44 Ind. 238; *Burson v. Edwards*, 1 Ind. 164; *Hinkle v. Davenport*, 38 Iowa, 355.)

HON. J. B. LESLIE, Judge of the Eighth Judicial District, sitting in place of MR. JUSTICE HOLLOWAY, delivered the opinion of the court.

This is an action to recover damages for libel. A trial of the cause in the court below resulted in a verdict for the defendant. Plaintiff moved for a new trial, which was denied, and from the judgment and the order overruling said motion the plaintiff appeals.

The complaint embraces two separate counts, in each of which plaintiff claims damages in the sum of \$5,000. The first count is for the publication of a certain alleged false, malicious and unprivileged communication on July 13, 1901, in the *Avant Courier*, a newspaper of general circulation, which publication plaintiff alleges tended to and did injure him in respect to his profession of school teacher. The second count is for a certain other false, malicious and unprivileged publication in said newspaper of August 24, 1901. Answering each count, the defendant admits the publication of said two articles, denies they were false, malicious or unprivileged, or that they tended to or did injure plaintiff in his profession, or that he was injured in any sum whatever. For further answer to each count, the defendant, by affirmative averments, pleads the truth of the matter contained in said publications, and also pleads certain facts in mitigation, not necessary to enumerate. The plaintiff demurred to each defense of the answer upon the ground that the same did not state a defense. This demurrer was overruled, and plaintiff replied.

1. The court did not err in overruling the demurrer to the answer. It is proper to suggest at this time that the first count of the complaint states a cause of action. The article, as set forth in this count, is as follows:

"As to Paxton's popularity as a teacher it can be illustrated by the fact that out of forty-five children in the district but four or five were attending when the superintendent visited the school last week. This is the only school Paxton has taught in the county, and for the good of the schools, I hope it will be the last one. He taught one term in Jefferson, and one in Madison county, and they want no more of him. The statements in the *Chronicle* are known to be false here. We knew that Paxton was a man of many attainments, but did not know that he was a common liar before. As he has gone to the Crow reservation now he has probably found his level."

Whatever may be said of other portions of the foregoing article, to publish, by a written charge, of an individual, that he is

a common liar, is an imputation tending to expose such individual to hatred, contempt, ridicule or obloquy, or injure him in his occupation; and if untrue, and not privileged, is libelous *per se*, and actionable. Such is the very nearly universal conclusion of the courts where this question has been adjudicated. A collection of the cases relating to this subject may be found in 18 Am. and Eng. Ency. of Law, 2d Ed., p. 921. See, also, Townshend, Libel and Slander, Sec. 177.

But returning to the question presented by the demurrer, in the construction of language regard is to be had to the words employed, and the meaning which, under all the circumstances of their publication, may be presumed to have been conveyed to those to whom the publication is made. While the written charge, "We knew that Paxton was a man of many attainments, but did not know that he was a common liar before," is in its nature, libelous *per se*, and needs no colloquium or innuendo to illustrate its application or meaning, and the vice imputed to plaintiff by the words standing alone is unqualified, and as broad as language can make it, yet, if the defamatory language is connected with other language which limits or affects its meaning, or might tend to mitigate the damage, its construction must be in relation to such other language, and in arriving at the sense in which the language is employed it is proper to consider the cause and circumstances of its publication and the entire language used. It is apparent on its face that the publication in question was a part of an article published in response, in part at least, to certain statements contained in the Chronicle. The matter set forth in the answer, upon which defendant relies for justification, is the history of a controversy which continued for some time between the plaintiff and the defendant, and the publication in question was a part of one of the articles constituting this controversy. The defendant alleges that the charge above referred to, implying a want of veracity in plaintiff, was limited in its meaning and application to certain statements previously published in the Bozeman Chronicle at the instance of plaintiff, and not otherwise, and that such statements were

untrue. He also pleads facts upon which is based the alleged truth of the other statements contained in said publication. The answer in this respect presented an issue as to the truth of the statements of the publication, upon which defendant was entitled to be heard, and amply meets the requirements of the rule urged by counsel for appellant: "When the imputation complained of is a conclusion from certain facts, the plea of justification must aver the existence of a state of facts which will warrant the inference of the charge." (Newell, Defamation, Slander and Libel, p. 652.)

2. At the trial defendant objected to the introduction of any evidence as to plaintiff's second cause of action upon the ground that the publication was not libelous *per se*, and that no special damages were alleged. The objection was sustained, and plaintiff excepted. Plaintiff's second cause of action is based upon the publication of August 24, 1901, heretofore referred to. The allegations are, in substance, that plaintiff is a school teacher, following that profession; that the article referred to was of and concerning him in his profession, occupation and business as such school teacher, and referred to his application for the position as teacher in the public school at Willow Creek, Gallatin county; that the said publication was false, malicious and unprivileged, and tended to and did injure him in his profession and occupation as a school teacher, to his damage in the sum of \$5,000. The article is set forth in the complaint, and is as follows:

"There were a number of applicants for the school, among them being the noted Paxton, who has done more damage and less good than any teacher we have ever had. This district knows when it has had enough, so it turned the gentleman down. A Miss Evans has been offered the position of teacher and we hope soon to have a good school running."

In this count of the complaint there is no colloquium, other than as stated above. There is no innuendo at all, and no allegation of special damages. The only damage claimed is that

sustained by plaintiff in his occupation and profession of school teacher, thus limiting the right of recovery, if any, to such general damages as were sustained in the special relation named. When the publication is libelous *per se*, the plaintiff may recover general damages without allegation or proof of special damages. In actions of this character "it is not necessary to state in the complaint any extrinsic facts for the purpose of showing the application to the plaintiff of the defamatory matter out of which the cause of action arose; but it is sufficient to state generally that the same was published or spoken concerning the plaintiff." (Code of Civil Procedure, Sec. 751.) But in other respects the rules of common-law pleading remain unaltered.

In *Harris v. Zanone*, 93 Cal. 65, 28 Pac. 845, in construing a similar statute, the supreme court says: "If the words used are not libelous in themselves, or if they have some occult meaning or local signification, and require proof to determine their meaning or to show that they are libelous, or if they are words in a foreign language, it is necessary to make such allegation of their meaning as will show them to be actionable, and by averment 'to ascertain that to the court which is generally or doubtfully expressed.' *Van Vechten v. Hopkins*, 5 Johns. 220, 4 Am. Dec. 339. The statute dispenses with them (that is, the colloquium and innuendo) only so far as they show that the defamatory words applied to the plaintiff, and goes no further. The averments necessary in common-law pleading to show *the meaning of the words* must still be made"—citing authorities.

When the words are unequivocal in their import, and obviously defamatory, it is not necessary to employ colloquium or innuendo to explain their application and meaning; but if the words be of doubtful significance, or derive their libelous character not from their own intrinsic force, but from extraneous facts, it is necessary to allege the meaning intended, or set forth such extraneous facts by proper averments. (13 Ency. Plead. and Prac. p. 33, and cases cited.) To say of a school teacher

that he is "noted," though used in an invidious sense, and referring to a particular district, "has done more damage and less good than any other teacher," and, referring to his application for a position as teacher of its school, "this district knows when it has had enough, so it turned the gentleman down," cannot be said to impeach him in any of those qualities which are essentials of an accomplished school teacher, and to falsely assail which it is slanderous or libelous *per se*. Says Mr. Newell: "It by no means follows that all words to the disparagement of an officer, professional man or trader will, for that reason, without proof of special damages, be actionable in themselves. Words, to be actionable on this ground, must touch the plaintiff in his office, profession or trade. They must be shown to have been spoken of the party in relation thereto, and to be such as would prejudice him therein. They must impeach either his skill or knowledge, or his official or professional conduct." (Newell on Slander and Libel, p. 168, par. 2; p. 174, par. 7.) The publication of August 24th does not disparage plaintiff in, or impute to him a lack of, any of the qualities or qualifications which are prerequisites to the due fulfillment of the duties of a school teacher. It does not appear on the face of the publication that the capacity or skill of the plaintiff as a school teacher, his scholarly attainments, or his professional conduct or integrity, were in any wise involved in the matters referred to, and the court properly withdrew from the jury all consideration of the second count of the complaint.

3. Plaintiff called defendant as a witness, and offered to prove by him that since the publication constituting the basis of the first cause of action defendant had tried to have revoked the certificate of plaintiff as a school teacher, to which offer objection was made and sustained, and plaintiff excepted. Other witnesses were called by plaintiff, by whom he offered to prove that defendant had stated to them, after the institution of this action, that he would take away the plaintiff's certificate, or words to that effect; to all of which objection was made and sustained, and plaintiff excepted. Plaintiff's assignments with

respect to these offers and the refusal of the court to allow the testimony introduced are Nos. 12, 13, 14, 15, 16, and may be discussed together.

Libel is defined by Section 32 of the Civil Code of Montana as follows: "Libel is a false and unprivileged publication in writing, printing, picture, effigy or other fixed representation to the eye which exposes any person to hatred, contempt, ridicule or obloquy, or which causes him to be shunned or avoided, or which has a tendency to injure him in his occupation." Under this statute the existence of malice is not a necessary ingredient to entitle the plaintiff to recover such sum as will fairly compensate him for the injury sustained. It would present no obstacle to such recovery that the defendant, acting in good faith, had probable cause for belief, and at the time did believe the charge to be true, and was absolutely free from malice.

Two classes of damages may be recovered in actions for libel, to-wit, actual damages and exemplary damages. The presence or absence of malice becomes material only as a circumstance affording a basis for increasing or diminishing the amount of recovery, and in cases involving the defense of privileged publication. The right to recover being shown, and the presence of malice wanting, compensatory damages can only be awarded; but, join to such right of recovery the element of malice, and exemplary damages may be added to the actual or compensatory damages. Malice is an inference of fact which the jury may draw from the libelous publication alone. (*Samuels v. Evening Mail Ass'n*, 75 N. Y. 604; *Warner v. Press Pub. Co.*, 132 N. Y. 181, 30 N. E. 393; *Clements v. Maloney*, 55 Mo. 352; *Schmisser v. Kreilich*, 92 Ill. 348; *Evening News Association v. Tryon*, 42 Mich. 549, 4 N. W. 267, 36 Am. Rep. 450.)

The plaintiff may, if he elect to do so, rely solely upon the libelous character of the publication to show malice, but he is not limited to it. He may also call to his aid and make use of any extrinsic facts which tend to show the presence of malice. It is impossible to look into the mind, and interpret the motives

which prompt its action, and resort may therefore be had to acts and declarations, if any, emanating from the individual touching the same, and observance of his conduct and bearing in relation to the subject-matter. While there is some conflict among the authorities as to the competency of statements and defamatory charges made after the commencement of the action, the better reasoning and decided weight of authority seem to favor the admissibility of other defamatory charges and of statements made by the defendant, even though after the commencement of the action, which may tend to evince a wish to vex, annoy or injure the plaintiff, but for the purpose only of proving malice, and not as affording a basis for extra compensation therefor. Some of the cases bearing upon this subject are: *Post Pub. Co. v. Hallam*, 59 Fed. 530, 8 C. C. A. 201; *Spolek Denni Hlasatel v. Hoffman*, 105 Ill. App. 170; *Hintz v. Graupner*, 138 Ill. 158, 27 N. E. 935; *Beals v. Thompson*, 149 Mass. 405, 21 N. E. 959; *Norris v. Elliott*, 39 Cal. 72; *Chamberlin v. Vance*, 51 Cal. 75; *Harris v. Zanone*, 93 Cal. 65, 28 Pac. 845; *Garrett v. Dickerson*, 19 Md. 418; *Fry v. Bennett*, 28 N. Y. 324; *Titus v. Sumner*, 44 N. Y. 266; *Robbins v. Fletcher*, 101 Mass. 115; *Noeninger v. Vogt*, 88 Mo. 589; *Bee Pub. Co. v. Shields*, (Neb.) 94 N. W. 1029; *Larrabee v. Minn. Trib. Co.*, 36 Minn. 141, 30 N. W. 462; *Faxon v. Jones*, 176 Mass. 206, 57 N. E. 359; *Ward v. Dick*, 47 Conn. 300, 36 Am. Rep. 75; *Davis v. Starrett*, 97 Me. 568, 55 Atl. 516.

The plaintiff should have been permitted to show the making by defendant of threats, if any, to secure the cancellation of his certificate entitling him to teach in the public schools.

4. In assignments of error Nos. 18, 19, 20 and 21 appellant complains of the action of the court in overruling plaintiff's objection to certain questions asked defendant with respect to his motives in using certain language in the articles alleged to be libelous, and in permitting him to explain certain statements therein, and whether certain statements made by him were true, and as to the source of his information with respect to the truth of certain statements. These were some of the facts involved



in the issues presented by the pleadings, and there was no error in these rulings.

5. Error is assigned for the refusal of the court to give certain instructions proposed by the plaintiff. In the instructions which were given to the jury, the court incorporated the substance of those offered by plaintiff, and it was not error to refuse to adopt those submitted by plaintiff. (*Territory v. Pendry*, 9 Mont. 67, 22 Pac. 760; *State v. Mahoney*, 24 Mont. 281, 61 Pac. 647.)

6. Appellant complains of certain instructions given by the court, to-wit, Nos. 1, 10, 12 and 13. Instruction No. 1 is confined to a statement of the issues of the case. While the jury may be permitted to take with them to the jury room the pleadings in the case, and, if they desire, study the issues for themselves, the practice of setting forth in the instructions a clear and concise statement of the nature of the case and the issues to be determined is to be commended, and the instruction is not objectionable. Instruction No. 10 informed the jury that plaintiff was claiming damages for injury to him in his profession of school teacher, and not as an individual, and in determining whether or not he had been damaged they should consider only such facts and circumstances as tended to show injury to him in the capacity of school teacher, and that they could not consider any facts and circumstances that tended to show injury to him as an individual. There is no suggestion anywhere in the complaint that plaintiff was damaged in his capacity as an individual, but the averments of the complaint are that the injury was to plaintiff in respect to his profession. The action was thus confined, by the terms of the complaint, to such damages as plaintiff might have sustained in his profession, and the court properly excluded from the jury all consideration of damage to plaintiff as an individual.

7. Instruction No. 13 contains nothing of which plaintiff can complain under the evidence as disclosed by the record.

8. A more serious question is presented by instruction No. 12. It reads as follows: "You are instructed that plaintiff's

cause of action is for alleged damages to his business as a school teacher, caused by the publication of the alleged libelous matter set out in the complaint on the 13th day of July, 1901, and that you cannot award him any damages unless such damages he may have received, if he have received any, were caused simply and only by said publication, and not otherwise; that is to say, if you should find that the plaintiff was damaged in his position and occupation as a school teacher, but that said damage was brought about and caused partly by the publication of other libels or the statement of other false charges or any other person, then you must find for the defendant, notwithstanding you might also find that the damage was partly caused by the publication set out in the complaint." By this instruction the jury were given to understand that, although the plaintiff might have convinced them by satisfactory proof that he sustained damage in his position as school teacher by the publication of July 13, 1901, yet, if such injury was caused in part by other libelous publications or false charges, it would be the duty of the jury to find for the defendant. Whether this instruction would be permissible in an action in which the plaintiff was seeking to recover special damages alone, or as confined to that character of damages, is not presented by the record in this case, and is not decided. Plaintiff's first cause of action affords a basis, if the facts warranted it, for the recovery of both general and special damages, but a diligent examination of the record fails to disclose any evidence which would entitle the plaintiff to recover any amount in the way of special damages. The maximum of plaintiff's right to recover, therefore, if at all, was only such general damage sustained on account of the publication declared on. When a false and unprivileged publication possessing the ingredients that stamp it as libelous *per se* is established, injury is presumed to ensue therefrom as the direct product of such publication, and affords ground for the allowance of at least nominal damages. (*Wilson v. Fitch*, 41 Cal. 386; *Mowry v. Raabe*, 89 Cal. 609, 27 Pac. 157; *Childers v. San Jose Mercury*, 105 Cal. 284, 39 Pac. 903, 45 Am. St. Rep. 40;

*Turner v. Hearst*, 115 Cal. 394, 47 Pac. 129; 18 Am. and Eng. Ency. of Law, 2d Ed., p. 1081, and cases cited.)

Referring to this subject, Mr. Sutherland says: "There is no legal measure of damages for such a wrong. The amount which the injured party ought to recover is referred to the sound discretion of the jury. \* \* \* When the publication is actionable *per se*, the legal presumption of damage goes to the jury, and they, in view of the particular circumstances of the case, are required, in the exercise of their judgment, to determine what sum will afford reparation." (3 Sutherland on Damages, 643-647.)

To recognize the doctrine embodied in instruction 12 as correct law in its application to an action to recover general damage would operate, in effect, to destroy the legal presumption above referred to of presumed injury inherent in *per se* defamatory charges. It would create a means of defense in actions of this character never contemplated by any principle of law. As pertinently suggested by counsel for appellant, all that a defendant would have to do would be to publish two libels against a party, and then introduce proof to show that he was damaged by both, and plaintiff could recover in neither. It is not an answer to this to say an action could be based upon both. A plaintiff may elect to unite several causes for injuries to character (Code of Civil Procedure, Sec. 672, Subd. 5), but he is not required to do so. Again, the defendant might publish a libelous article, and procure one of similar import to be published by another, and the same result would follow. Such a principle, if it were allowed to control in cases of this character, would seriously jeopardize the interest of a plaintiff whenever he exercised the valuable and unquestionable right to show other defamatory charges for the purpose of proving malice. The case of *Ward v. Dick*, 47 Conn. 300, 36 Am. Rep. 57, and others cited by counsel for respondent in support of the correctness of the instruction under consideration, are not in point. They, in effect, decide that other libels or slanders than the one sued

on, or a repetition of the one sued on, cannot be made an extra element of damage for which compensation may be awarded—a doctrine which will meet with no dissent here. The instruction was an erroneous statement of the law, and the presumption is that it was prejudicial to the plaintiff (*State v. Mason*, 24 Mont. 341, 61 Pac. 861), and the judgment should be reversed, unless there is merit in a contention raised by counsel for respondent, based upon Article III, Section 10, Constitution of Montana. So much of the section as relates to this case reads as follows: "In all suits and prosecutions for libel, the truth thereof may be given in evidence; and the jury, under the direction of the court, shall determine the law and the facts."

Counsel for respondent argues that, the Constitution having clothed the jury, in suits and prosecutions for libel, with power to determine the law and the facts, and in this case the jury having found a verdict against the plaintiff, it becomes immaterial how erroneous the instructions of the court may be; that no error can be remedied by appeal, because the instructions are merely advisory, and may be disregarded by the jury in the exercise of this power to determine the law and the facts. The history of this provision shows it is the outgrowth of an act of the English parliament, adopted in 1792, and known as the "Fox Libel Act." Its enactment, in modified forms, into the Constitutions of many of the States of the Union has followed, some of them limiting its operation to criminal prosecutions for libel, while others extend it to civil actions for libel as well; in some is omitted the clause "under the direction of the court," in others it is incorporated, as has been done in the Constitution of this state. (Cooley's Constitutional Limitations, pp. 460, 463.) This provision has received the earnest consideration of the courts of last resort of many of the states, and there exists great contrariety of opinion as to the extent of power conferred upon the jury, independently of the court, to determine the law and the facts and judge of the whole case. A review of the cases relating to this subject can serve no useful purpose here, as the questions whether the jury is required to accept the in-

structions of the court as conclusive, and what power resides in this court to review a case where the instructions and other procedure of the trial court are free from error, are questions not involved in this case. Whatever view is adopted, the courts are almost, if not quite, a unit upon the proposition that it is the duty of the judge to decide upon the sufficiency of the pleadings, the admissibility of testimony, instruct the jury, and discharge the other functions devolving upon him down to the final submission of the cause to the jury, as in other cases. In Missouri, where the doctrine prevails that the jury may disregard the instructions, it is said in *State v. Armstrong*, 106 Mo. 395, 16 S. W. 604, 13 L. R. A. 419, 27 Am. St. Rep. 361, that: "While the judge may assist and inform them what the law is, and it is his duty to do so, still they are, by virtue of organic law, the final judges in a prosecution for criminal libel." In *Drake v. State*, 53 N. J. Law, 23, 20 Atl. 750, Justice Dixon, construing a similar constitutional provision says: "It was not intended to affect the duty of the court to decide all questions of law relating to the admission of testimony and such other matters as are preliminary to the final submission of the case to the jury; nor to affect its duty to instruct the jury with regard to their legitimate province in the decision of the cause, and with regard to those general principles of the criminal law and of the law of libel which are of a technical nature, and with which the jury can scarcely become acquainted, save through the instructions of the court. None of these matters were ever subject to doubt in prosecutions for libel, nor did they bring about any of the legislation either in England or in this country. On these points the instructions of the court retain the same authority as they previously possessed." See, also, *Arnold v. Jewett*, 125 Mo. 241, 28 S. W. 614; *Hazy v. Woitke*, 23 Colo. 556, 48 Pac. 1048; *Thibault v. Sessions*, 101 Mich. 279, 59 N. W. 624; *State v. Zimmerman*, 31 Kan. 85, 1 Pac. 257; *State v. Whitmore*, 53 Kan. 343, 36 Pac. 748, 42 Am. St. Rep. 288; *State v. Rice*, 56 Iowa, 431, 9 N. W. 343; *Montgomery v. State*,

11 Ohio, 424; *State v. Syphrett*, 27 S. C. 29, 2 S. E. 624, 13 Am. St. Rep. 616, and cases cited in note. In *State v. Rice* and *State v. Syphrett, supra*, it was held that an erroneous instruction was ground for reversal.

The duty of the court to instruct the jury being recognized, it follows as a corollary that a correct declaration of the legal principles involved should be given to the jury, otherwise the requirement to instruct would be a needless formality, barren of all useful purpose.

There are other assignments which have been examined but there is no merit in them. Because of the errors referred to, the judgment and order are reversed, and the cause remanded for a new trial.

*Reversed and remanded.*

MR. CHIEF JUSTICE BRANTLY concurs.

MR. JUSTICE MILBURN: I concur in the conclusion and in what is said in the opinion, except as to so much thereof as states or implies that, to say of a school teacher that he has done more damage and less good than any teacher the district ever had "cannot be said to impeach him in any of those qualities which are essentials of an accomplished school teacher, and to falsely assail which it is slanderous or libelous *per se*."

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STATE EX REL. RILEY, RELATOR, v. WESTON, COUNTY  
CLERK, RESPONDENT.

(No. 2,108.)

(Submitted October 12, 1904. Decided October 13, 1904.)

*Appearance—Premature Action—Waiver of Objection—Elections—Right to Place on Official Ballot.*

1. An objection that the proceeding is prematurely brought is waived by counsel of respondent appearing and asking that the rights of the parties be adjudicated.
2. Where there were contending factions of the democratic party in a certain county, and the state convention admitted the delegates of both factions into the convention, and gave to each delegation the right to cast one-half the vote of such county, but no nominations had been made at the time the state convention was held by either of such county factions, the state convention, while it had the power to admit both contesting delegations, could not lawfully decide in advance that the nominees at subsequent conventions of either faction should be considered the regular nominees of the democratic party of such county, and entitled to have their names on the official ballot as "democratic."
3. Session Laws 1901, amending the election law to the extent of removing the circle from the head of each ticket, thereby preventing a voter from voting a straight ticket by marking in the circle, in no wise amends the rule that only one ticket shall appear on a ballot under a particular party designation.
4. The county committee of a political party duly called a convention at a certain time and place. The convention regularly organized, and placed in nomination candidates. A contesting delegation claimed that they were excluded from participation in the convention, and thereupon nominated certain other nominees, which they claimed were entitled to the party designation on the official ballot. The county convention was regularly called to order, and opportunity given to contestants to present their credentials. The contesting delegates made no attempt to be admitted by presenting their credentials, but proceeded to organize another convention. *Held*, that the nominees of the independent convention were not entitled to have their names placed on the official ballot instead of the nominees of the regular convention.

ORIGINAL proceedings in the name of the state on the relation of James M. Riley for *mandamus* against John Weston, county clerk. Judgment for relator.

STATEMENT OF THE CASE BY JUDGE E. K. CHEADLE.

Petition for writ of *mandamus*. At the county convention of the Democratic party of Silver Bow county, held in Butte on the 28th and 29th days of September, A. D. 1902, a Democratic county central committee was chosen, to which the organization and management of the Democratic party were intrusted by the said convention, in accordance with the custom and practice of political parties. On the 17th day of August, 1904, the said county central committee met and issued a call to the Democratic electors of Silver Bow county, Montana, for a primary election to be held in the different precincts in said county for the pur-

pose of selecting delegates to assemble in county convention on the 12th day of September, 1904, for the purpose of electing delegates to the state convention of the Democratic party, which was to be held in the city of Helena, Montana, on the 14th day of September, 1904, and of nominating a Democratic ticket for Silver Bow county, composed of Democratic candidates for the various county and township offices, to be voted for by the said electors at the ensuing general election on the 8th day of November, 1904. In pursuance of said call the Democratic electors of Silver Bow county lawfully assembled at primary meetings and elected delegates from each of the respective precincts of the said county to the Democratic county convention to be held on the 12th day of September, 1904. On the 12th day of September, 1904, pursuant to the call of the Democratic county central committee, the persons selected as delegates to the said convention assembled in the Auditorium of the city of Butte for the purpose of holding a Democratic county convention and carrying out the objects for which the convention had been called, as specified in the aforesaid call of the committee.

It appears that the said Democratic convention of Silver Bow county was called to convene at 12 o'clock noon of the 12th day of September, and that before the hour of convening arrived the Auditorium was filled with a crowd of persons composed of some of those who afterwards sat in the Walsworth convention, some who sat in the Walker convention, and many spectators; that in the crowd so assembled in the Auditorium there were many persons claiming to be delegates and alternate delegates from various precincts in Silver Bow county; that from some of these precincts there were two conflicting sets of delegates and alternates, each claiming the right to sit in the said Democratic convention; that the county central committee had engaged the Auditorium from the city of Butte for holding the said convention, and such committee, desiring the use of the Auditorium in which to hold an executive session of the committee prior to the opening of the convention, asked all present to leave the room, and, this request being ignored, the central committee made a



demand upon the Honorable Patrick Mullins, mayor of the city of Butte, that the hall be cleared, and that the committee be put in possession of the same; that thereupon the mayor, assisted by a body of police, cleared the Auditorium of all persons except the county central committee, and put such committee in possession; that in clearing the hall no distinction whatever was made between those who afterwards sat in the Walsworth convention and those who sat in the Walker convention, but all alike were excluded, together with the spectators; that thereupon a portion of the persons claiming to be delegates and alternate delegates from certain precincts of Silver Bow county departed from the Auditorium, went to the courthouse, and then to the Family Theater in the city of Butte, and proceeded to organize and assemble in convention; that these persons made no further effort to gain admission to the convention called to assemble at the Auditorium by presentation of credentials from their respective precincts or otherwise; that the county central committee caused the Auditorium to be opened for the admission of all those persons claiming to be delegates and alternate delegates from the various precincts of Silver Bow county, and proceeded to effect a temporary organization of the Democratic county convention upon a temporary roll call compiled by the county central committee from the returns of the primary elections held in the various precincts of Silver Bow county; that in the regular course of procedure the said county convention was permanently organized, and delegates and alternate delegates elected to the state convention to be held on the 14th day of September, 1904. This convention will be designated as the "Walsworth Convention," from the name of its chairman.

The persons who met at the Family Theater, claiming to be delegates and alternate delegates from certain of the precincts of Silver Bow county, organized as a convention, and also selected delegates to the Democratic state convention to be held at Helena, as aforesaid. This convention will be designated as the "Walker Convention," from the name of its chairman.

After the Walsworth convention had selected its delegation to the state convention, it was regularly adjourned to reconvene on the 28th day of September, 1904, at noon, in the Auditorium in the city of Butte. In pursuance of said adjournment, it regularly assembled at that time and place. Thereupon the said convention nominated Democratic candidates for the following named offices, to-wit: Twelve members of the house of representatives of the legislative assembly of the state of Montana, two candidates for district judge of the Second judicial district of the state of Montana, one sheriff, one county treasurer, one county attorney, one county clerk and recorder, one county auditor, one county assessor, one county superintendent of schools for Silver Bow county, Montana, and various other county and township offices, to be voted for at the ensuing general election.

After the selection of its delegates to the Democratic state convention, the Walker convention adjourned to meet again at the Family Theater in the city of Butte on the 24th day of September, 1904, and nominated candidates for the same offices as those for which nominations were made by the Walsworth convention.

Both the Walsworth and the Walker delegates sought admission to the Democratic state convention held at Helena on September 14th, and by the action of the said convention each of the said delegations was admitted to the said convention, and empowered to cast one-half the vote to which Silver Bow county was entitled. It further appears that the state convention took no further action toward determining which of the contesting delegations was entitled to represent Silver Bow county in the said convention.

It appears that one James M. Riley was nominated by the Walsworth convention as the Democratic candidate for the office of sheriff of Silver Bow county, and that after the nominations were made the said convention adjourned and subsequently, to-wit, on the 30th day of September, 1904, W. W. Walsworth, the chairman and presiding officer of said convention, and Harry

Ayleshire, secretary thereof, duly prepared a certificate of nomination, and caused it to be presented to the respondent, John Weston, clerk and recorder of the county of Silver Bow, Montana, to be filed in the office of the county clerk and recorder of said county as the certificate of nomination of the Democratic party of the county of Silver Bow, in order that the names of the persons appearing in said certificate as candidates might be lawfully and regularly placed upon the official ballot by said respondent in the column thereon headed "Democratic"; that the respondent declined to file the said certificate, and stated that he would not file the said certificate, and would not place the names of the persons appearing thereon as candidates for the various county offices upon the official ballot as such candidates in the column headed "Democratic."

It appears that the relator and all other candidates named both by the Walsworth and by the Walker convention are possessed of the necessary legal qualifications for holding the offices for which they are respectively nominated.

The relator, on behalf of himself and the other nominees of the Walsworth convention, prays that a writ of this court issue requiring the respondent to file the said nomination and to place the names of the said candidates upon the official ballot in the column thereon marked "Democratic."

The nominees of the Walker convention, appearing in open court, ask that the respondent be required also to place the names of the nominees of the Walker convention upon the official ballot in the column thereon marked "Democratic."

*Mr. W. M. Bickford, Mr. George F. Shelton, and Mr. C. F. Kelley, for Relator.*

*Mr. John J. McHatton, Mr. I. G. Denny, and Mr. J. E. Healy, for Respondent.*

HON. E. K. CHEADLE, Judge of the Tenth judicial district, sitting in the place of the CHIEF JUSTICE, delivered the opinion of the court.

At the hearing of this cause counsel for the respondent first objected to the admission of any testimony, upon the ground that the proceeding was prematurely brought. This objection was overruled by the court *pro forma*, and the taking of testimony proceeded. Subsequently, and before the final ruling of the court upon the objection, counsel for the nominees of the so-called "Walker ticket" appeared in open court, and asked that their clients, the said nominees, be permitted to appear in this proceeding, and that their rights be adjudicated. This request was granted by the court, all parties consenting, whereupon the said nominees appeared by their counsel, and participated in the examination of the witnesses of relator, and introduced witnesses to testify on their own behalf. This action of the so-called "Walker nominees" is held by the court to be, in effect, a waiver of the objection that this proceeding is prematurely brought, and a ruling upon the said objection is therefore reserved by the court.

There is no material contradiction in the testimony. The pleadings of the respective parties, the admissions of respective counsel, and the evidence leave substantially but one question to be decided by this court, to-wit: Was the so-called "Walsworth convention" or was the so-called "Walker convention" the regular convention of the Democratic party of Silver Bow county, duly organized and legally empowered to nominate candidates for such offices as it was within the powers of that convention to make under the regular Democratic party designation?

It is the contention of the relator that the Walsworth convention was the regular party convention of the Democratic party, and that its nominees should be placed upon the official ballot in the column thereon designated "Democratic," and that the nominees of the Walker convention should be entirely excluded therefrom. It is the contention of counsel for the Walker nominees that both tickets should be placed upon the official ballot in separate columns, each of which should be entitled "Democratic." The respondent, Weston, took the position that he did

not know which certificate he should receive, or the names of which nominees he should place upon the official ballot, and therefore declined to take any action in the matter until directed by this court.

It is urged by counsel for the Walker nominees that, inasmuch as the state convention admitted the delegates both of the Walsworth and of the Walker convention to seats in the state convention, and gave to each delegation the right to cast one-half the vote of Silver Bow county in the state convention, the action of the state convention was a recognition of both factions, and entitles each convention to be considered as a regular Democratic convention of the party in Silver Bow county, and that because of this recognition and the implied regularity of both conventions the nominees of each convention are entitled to be placed upon the ticket.

The state convention had the power for its own purposes to recognize either or both of the contending factions. No nominations had been made by either the Walsworth or by the Walker convention at the time that the state convention was held, and consequently there were no individual rights of nominees for the offices for which nominations might be made by a county convention to be affected by the action of the state convention. If the state convention had held that either the Walsworth or the Walker delegates were solely entitled to represent the Democratic party of Silver Bow county in the state convention, the question presented to this court would be a different one. However, while the state convention had the power to admit both the contesting delegations to seats in its body and to a participation in its proceedings, it could not lawfully decide in advance, or at all, that the nominees of each of the so-called conventions should be considered the regular nominees of the Democratic party of Silver Bow county, and entitled to have their names placed upon the official ballot in columns designated as "Democratic." This court has heretofore held in *State ex rel. Kennedy v. Martin*, 24 Mont. 403, 62 Pac. 588, that only one ticket shall appear

upon a ballot under a particular party designation. This case was decided October 22, 1900. The Session Laws of 1901 (page 117) amend the law as it existed at the time of the above decision only to the extent of removing the circle from the head of each ticket, thereby preventing a voter from voting his straight ticket by marking in the circle. The court is of the opinion that this amendment in no wise changes the rule announced in the *Martin Case*, above. It follows that there can be but one democratic ticket printed upon the official ballot.

Thus there remains but one question for determination by this court: Was the ticket nominated by the so-called Walsworth convention nominated by a convention duly constituted and organized under the regularly constituted authority or party organization of the Democratic party of Silver Bow county? There is no question but that the Democratic county central committee of Silver Bow county had the authority to issue a call for primary elections of delegates to a county convention. It is undisputed that this convention assembled at the time and place designated in the call of the central committee, that it proceeded regularly to organize, and that upon such organization being completed it placed in nomination the candidates composing the so-called Walsworth ticket. The sole claim of the so-called Walker nominess is that delegates alleged to have been chosen from certain precincts in Silver Bow county were excluded from participation in the convention. The evidence clearly shows, however, that after the Auditorium, which was a place owned and controlled by the city, was cleared by the mayor of Butte at the request of the central committee through its chairman, the convention was regularly called to order, and that there was opportunity for all claiming to be delegates to present their credentials to the regularly appointed committee of the convention. By the admission of counsel for the Walker nominees, the contesting delegates made no attempts to be admitted into the convention by presenting their credentials to the proper committee or otherwise, but immediately upon the clearing of the Auditorium proceeded to the courthouse, and

then to the Family Theater, in the city of Butte, and there proceeded to organize another convention.

Under these circumstances it appears clearly to the court that the so-called Walsworth convention was in fact the regularly constituted and organized convention of the Democratic party of Silver Bow county, and duly empowered to nominate candidates for the offices for which it made nominations, and that the so-called Walker convention was in no sense entitled to be considered as a regular and legal convention of the Democratic party.

For these reasons the peremptory writ of *mandamus* was ordered to be issued on the 13th day of October, 1904.

*Writ issued.*

MR. JUSTICE MILBURN and MR. JUSTICE HOLLOWAY CONCUR.

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STATE EX REL. GALEN, RELATOR, v. HAYS, RESPONDENT.

(No. 2,114.)

(Submitted October 15, 1904. Decided October 17, 1904.)

*Elections—Nominations — Certificate—Sufficiency—Time of Filing—Filling of Vacancies.*

1. Political Code, Section 1316, requiring certificates of nomination to be filed with the secretary of state not more than sixty nor less than thirty days before election, is mandatory, and a certificate of original nominations made by a party convention cannot be filed less than thirty days before election.
2. Under Political Code, Section 1311, relative to the filing of certificates of convention nominations, and providing that the certificate of nomination, which must be in writing, must contain the name of each person nominated, his residence, etc., all convention nominations of one party must be contained in a single certificate, and a separate certificate for each nominee cannot be filed.

3. Political Code, Section 1311, provides for the filing with the secretary of state of a certificate of the nominations made by party conventions, and Section 1320 provides that, if any certificate of nomination is or becomes insufficient the vacancy may, if the original nomination was made by a party convention which had delegated to a committee the power to fill vacancies, be filled by such committee. *Held*, that an inadvertent failure to include the name of a convention nominee for a certain office in the certificate of nominations renders that certificate insufficient, within the meaning of Section 1320, and entitles the proper committee to fill the vacancy.

APPLICATION by the state, on the relation of Albert J. Galen, against George M. Hays, as secretary of state, for a writ of mandate. Writ issued.

*Mr. H. G. McIntire, Mr. M. S. Gunn, and Mr. Henry N. Blake, for Relator.*

*Mr. James Donovan, Attorney General, for Respondent.*

MR. JUSTICE MILBURN delivered the opinion of the court.

This is in the matter of the application for a writ of mandate to compel the secretary of state to receive and file a certain certificate of nomination of the petitioner for the office of attorney general of the state of Montana, said certificate having been made by the state central committee of the Republican party, and to certify to the several county clerks in the state the name and description of the petitioner as the candidate of said party for the office mentioned, to the end that said nomination should be printed upon the official ballots of the several counties for the general election to be held on November 8, 1904. The attorney general, Hon. James Donovan, appeared for the respondent.

The facts in the case are not in dispute. The petitioner was duly nominated at the Republican state convention for the office of attorney general. Through inadvertence, accident or mistake the name of Albert J. Galen, the petitioner herein, was omitted from, and no mention was made of the office of attorney general in, the certificate of nominations which was made, signed and filed in the office of the secretary of state by the chairman and



secretary of the convention. It having been discovered that the name of Mr. Galen as such nominee and all mention of the office of attorney general were wanting in the certificate so filed on the 1st day of October, 1904, the state central committee of said party at a meeting held in the city of Butte in this state on the 11th day of October, at which more than a majority of the members thereof was present, passed and adopted a resolution to the effect that, as there was a vacancy as to the office of attorney general existing in the nominations as certified by the chairman and secretary of the Republican state convention, and as the said committee was desirous of filling such vacancy, therefore it was resolved that Albert J. Galen, whose residence was, etc., was regularly nominated to fill said vacancy, and the chairman and the secretary of the said committee were then and there authorized and directed to certify the Galen nomination so made to the secretary of state. A certificate was made in accordance with said direction, and properly signed, and presented to the secretary of state on the 12th day of October, 1904, at his office. It appears that the secretary of state, being in doubt as to his duty under the circumstances, then and there refused to accept or receive such certificate, and stated that he would refuse to certify to the county clerks the nomination thus made.

An alternative writ having been issued by this court upon proper petition, the attorney general, for the respondent, moved to quash and set aside the petition upon the grounds (1) that it showed that there was no vacancy existing in the nomination for attorney general on the said ticket; (2) that the certificate tendered was not the regular certificate of nomination by the convention, but was made by the state central committee to fill an alleged vacancy, instead of being certified by the proper officers of the convention. The position of the respondent was that the statute (Section 1316, Political Code) requiring certificates of nomination to be filed with the secretary of state not more than sixty days and not less than thirty days before the day fixed by law for the election is directory, and not mandatory, and that, therefore, the time not having arrived for the secretary

of state to certify the nominations to the county clerks, there was ample time for the officers of such convention to make a certificate of nomination of Mr. Galen, certify the same, and have it filed by the secretary of state; and that, such being the law and the facts, there was no authority in law for the making and filing of such a certificate as the one presented, to-wit, one made by the officers of the state central committee. The attorney general stated that, if his motion should be overruled, he would stand upon it. The motion to quash was overruled.

This court, in *State ex rel. Scharnikow v. Hogan*, 24 Mont. at page 402, 62 Pac. 683, expressly declared that certificates of original nominations made by party conventions must be filed within the period prescribed by Section 1316, but that there is no such requirement in respect of nominations made by virtue of the delegated power in a committee to fill vacancies.

It was stated on the part of the respondent on the hearing that the law did not contemplate merely one certificate embracing all the nominations, but that it was the duty of the officers of a convention to certify each nomination, and that this might be done by separate certificate for each nominee, and that the certificate on file therefore was not insufficient or inoperative under Section 1320, Political Code, and had not become such as to Mr. Galen, for the reason that there had not been any certificate of nomination made on his behalf. The statute (Section 1311, Political Code) contemplates one certificate of nomination, and one only, as coming from the state convention, for it says: "The certificate of nomination, which must be in writing, must contain the name of each person nominated, his residence, \* \* \* and it must be signed by the presiding officer and secretary of such convention. \* \* \*"

As we have said, it is mandatory that this certificate must be made and filed before the thirty days before the election commence to run. The certificate filed certainly was, when received by the secretary of state, insufficient for the purpose of declaring the will of the Republican party in convention assembled

as respects nominations, and for carrying into effect the intention of the legislature, which had provided for a certain form and style of one ballot to be presented to the people after being prepared in the manner fixed by the election laws.

Under Section 1320 of the Political Code, "if any person so nominated dies before the printing of the tickets, or decline the nomination as in this chapter provided, or if any certificate of nomination is or becomes insufficient or inoperative from any cause, the vacancy or vacancies thus occasioned may be filled in the manner required for the original nomination. If the original nomination was made by a party convention which had delegated to a committee the power to fill vacancies, such committee may, upon the occurring of such vacancies, proceed to fill the same. The chairman and secretary of such committee must thereupon make and file with the proper officer a certificate setting forth the cause of the vacancy, the name of the person nominated, the office for which he was nominated, the name of the person for whom the new nominee is to be substituted, the fact that the committee was authorized to fill vacancies, and such further information as is required to be given in an original certificate of nomination. The certificate so made must be executed in the manner prescribed for the original certificate of nomination, and has the same force and effect as an original certificate of nomination. \* \* \*" Such a certificate to fill a vacancy was made by the state central committee, to which the necessary authority had been duly given by the convention, and was offered to the secretary of state.

"The statute is silent touching the time within which must be filed the certificate of nomination made by a committee to fill a vacancy occasioned by the insufficiency of the certificate of the original nomination. When a convention has made a nomination, and has authorized its committee to fill any vacancy that may occur, the filling of the vacancy by the committee upon the death or resignation of the candidate, or because the original certificate of nomination was or became insufficient or inoperative, may be made at any time before the day of election."

(*State ex rel. Scharnikow v. Hogan, supra.*) In our opinion, under the circumstances of this case, such a vacancy existed at the time the certificate above mentioned was offered for filing. (*State of Nebraska ex rel. Fox v. Clark County Clerk*, 56 Neb. 584, 77 N. W. 87; *Bower v. Clemans*, 61 Kan. 129, 58 Pac. 969; *People ex rel. Powell v. Hartley*, 170 Ill. 370, 48 N. E. 950; *Rathburn v. Hamilton*, 53 Kan. 470, 37 Pac. 20.)

To adopt the language used by the Nebraska court in the case above, we may say that, while by a labored effort in that direction, or by some refined reasoning for the purpose, doubtless the vacancy which existed in the roll of Republican nominees when Albert J. Galen was nominated by the state central committee might be argued to be one which was not within the terms or meaning of the portion of the section of the election law which we have quoted, when the words are given their ordinary significance it appears still that it is just such a vacancy as was in contemplation of the lawmakers in the enactment of said section. The convention undoubtedly made the nomination, and its officers, who, both by the convention and the law, were required to certify the same, negligently or inattentively failed to make the certificate sufficient to show the complete results in the nominations made, and it thus was rendered inoperative as to the one in question, and there was thus created a vacancy in the nominations, clearly within the common-sense meaning of the words employed in the section of the election law to which we have referred.

It was ordered heretofore, to-wit, on the 17th day of October, 1904, that a peremptory writ of mandate issue, directing the secretary of state to receive the certificate of nomination made by said committee, and file the same, and to enter the name of Mr. Galen under the designation of the Republican party for the office of attorney general as nominated by said convention.

*Writ issued.*

MR. JUSTICE HOLLOWAY concurs.

MR. CHIEF JUSTICE BRANTLY took no part in this decision.

STATE EX REL. ATHEY, RELATOR, v. HAYS, SECRETARY  
OF STATE, RESPONDENT.

(No. 2,118.)

(Submitted October 15, 1904. Decided October 17, 1904.)

*Elections—Nominations — Mass Convention—Power of Committee.*

1. A call for a mass convention of electors stated that the object was to organize central committees opposed to corporate rule, and to give the voters of the state an opportunity to vote for men free from corporate control, and did not state that the convention was to assemble to nominate candidates for any office whatever. Held not a call of the electors of the state to assemble and select candidates for public office.
2. Under Political Code, Section 1310, a mass convention of electors can make nominations of candidates for public office only where such convention was called for that purpose.
3. If a mass convention of electors could not make nominations for public offices because the call of the convention did not set forth such purpose, a committee appointed by such convention could not make such nominations.
4. Under Political Code, Section 1314, where the same committee appointed by a mass convention nominated two tickets, composed of different persons as candidates for the same offices, both tickets were void, and neither can appear on the official ballot.

ORIGINAL proceeding in the name of the state, on the relation of John T. Athey, against George M. Hays, secretary of state, for an injunction. Judgment for relator.

*Mr. H. G. McIntire, Mr. H. N. Blake, and Mr. M. S. Gunn,*  
for Relator.

*Mr. James Donovan, Attorney General, Mr. R. B. Smith,*  
*Mr. A. I. Loeb, and Mr. J. M. Denny,* for Respondent.

HON. FRANK HENRY, Judge of the Sixth Judicial District, sitting in the place of the CHIEF JUSTICE, delivered the opinion of the court.

This is an original proceeding in this court, instituted by relator, to restrain the secretary of state from certifying to the various county clerks of this state, as candidates of the Anti-

Trust Democratic party and of the Anti-Trust Republican party, the names of candidates for presidential electors, representative in congress, and the several state offices.

The complaint alleges, among other things, that relator is a citizen of the United States and of the state of Montana, an elector thereof, and the nominee of the Republican party for clerk of the supreme court; that there has been filed in the office of the secretary of state a paper purporting to be a certificate of nomination by a committee of the Anti-Trust Democratic party for presidential electors, representative in congress, and the several state offices, and also what purports to be a certificate of nomination by a committee of the Anti-Trust Republican party for presidential electors, representative in congress, and the several state offices; that such political parties had no existence prior to the 7th day of December, 1903, and had no power or authority to make such nominations; and relator therefore prays that the secretary of state be restrained and enjoined from certifying to the several county clerks the names of the candidates purported to have been nominated and selected by said committees.

The answer sets forth the fact that, pursuant to a call heretofore issued, a mass convention, composed of electors of the state, to the number of about 650, representing all the counties of the state, with one or two exceptions, assembled in the city of Helena on the 7th day of December, 1903. So far as the purposes of this mass meeting are disclosed by the call under which it assembled, they are: "To take steps to organize one or more state central committees opposed to corporate rule, and that will give to the voters of this state an opportunity to vote for men free from corporate control and dictation at our next state election." After the organization of the convention and the promulgation of a platform of principles, an executive committee of five was selected, whose power and authority is stated in the following resolution passed by said convention: "Be it resolved, that the executive committee be given full plenary powers to act for and on behalf of this convention to nominate

candidates for state offices at the next general election, in the names Anti-Trust Democratic party and Anti-Trust Republican party, to fill vacancies which might occur on the ticket of said parties, and to do everything that may become necessary to a proper furtherance of the cause." After the adjournment *sine die* of the meeting, the executive committee published two calls, one for each of the two said political parties, calling a convention for each to nominate candidates. Subsequently the committee revoked these calls. Thereafter, pursuant to the above resolution, said committee did cause to be filed in the office of the secretary of state certificates of nomination as heretofore stated, each of which said certificates recites the fact that, all of the members of said committee being present, the same were made by and through its chairman and secretary. The certificates differ only in the names of the candidates for presidential electors and representative in congress, the chairman and secretary, and the dates upon which said certificates purport to have been made.

The case was submitted upon relator's motion for judgment on the pleadings.

The first question that confronts us in the determination of this case is whether a new political party was organized on the 7th day of December, 1903, and, if so, did it then have the power or authority to nominate candidates for the various offices to be voted for on the 8th day of November next?

The call under which the mass convention assembled does not specifically state that it is for the purpose of organizing a new political party or parties, but this might be inferred from the statement therein as to the purpose of the meeting. The call, however, does not state that the convention is to assemble for the purpose of nominating candidates for any offices whatever. Unquestionably, electors from the several counties of the state could assemble at a given place and organize a new political party; but, in order to have the ticket thus nominated printed at public expense upon the official ballot, certain formalities and

requirements are necessary to entitle the ticket to legal recognition. In the first place, to make party nominations, there must be a substantial representation of the people of the party. They must, first, have been informed of the purposes for which the meeting was called; and, second, must have been given an opportunity to participate in such a meeting, or it is not such a representative body as the law requires. (*State ex rel. Woody v. Rotwitt*, 18 Mont. 502, 46 Pac. 370; *State ex rel. Russel v. Tooker*, 18 Mont. 540, 46 Pac. 530, 34 L. R. A. 315; *State ex rel. Metcalf v. Johnson*, 18 Mont. 548, 46 S. W. 533, 34 L. R. A. 313; *State ex rel. Scharnikow v. Hogan*, 24 Mont. 383, 62 Pac. 583; *State ex rel. Hatch v. Smart*, 24 Mont. 413, 62 Pac. 591.)

Section 1310 of the Political Code is as follows: "Any convention or primary meeting held for the purpose of making nominations to public office, or the number of electors required in this chapter, may nominate candidates for public office to be filled by election in the state, and a convention or primary meeting within the meaning of this chapter is an organized assemblage of electors or delegates representing a political party or principle." This convention was not composed of electors or delegates of a political party, but electors advocating a principle, and assembled, we presume, for the purpose of organizing a party. Until there was an organization and an authoritative declaration of the principles of the assemblage, it could have no existence as a political party, and consequently could not make party nominations. If it was a mass convention of electors of the state, assembled for the purpose of nominating candidates for office, it could have done so, provided it was called together for that purpose, and was a representative body of the electors of the state advocating or representing a principle.

Waiving the question as to whether the mass convention held in Helena on the 7th day of December, 1903, was a representative body of the electors of the state, and therefore entitled to legal recognition, we are unable to construe the language of the



call for the mass convention into an invitation to the electors of the state to assemble and nominate candidates for public office. The action of the executive committee in calling nominating conventions clearly indicates that the committee at that time placed no such construction on the purposes of the convention, or the authority of the committee to make nominations. If the convention could not make nominations, it certainly could not delegate to a committee authority it did not possess.

Aside from this, there is an insuperable objection to the validity of the certificates. This convention, through its executive committee, assumes an anomalous position. It performed the marvelous feat of nominating two tickets, composed of different persons, as candidates for the same offices. By what piece of legerdemain the members of the convention expected to elect both tickets, we are unable to surmise. Such a proceeding is not only wrong, but illegal, and is within the inhibition of the provisions of Section 1314 of the Political Code, which is as follows: "No certificate of nomination must contain the name of more than one candidate for each office to be filled. No person must join in nominating more than one person for each office to be filled, and no person must accept a nomination to more than one office." This committee has assumed the authority to nominate different persons for presidential electors and representative in congress. This could not have been done by the convention, nor can it be done by the executive committee, and the names of such nominees are therefore not entitled to places on the official ballot.

For the foregoing reasons, we are of opinion that the facts stated in defendant's answer constitute no defense, and relator's motion for judgment on the pleadings is sustained.

Heretofore the decision of this court was announced, and an injunction as prayed for by relator issued.

MR. JUSTICE MILBURN and MR. JUSTICE HOLLOWAY concur.

BEAUDIN, RESPONDENT, v. OREGON SHORT LINE  
RAILROAD CO., APPELLANT.

(No. 1,945.)

(Submitted September 29, 1904. Decided October 19, 1904.)

*Railroads—Killing Livestock—Fences—Pleading and Practice.*

1. Civil Code, Section 950, applies only to livestock belonging to the owner or one in possession of land along or through which the railroad passes, which has been killed or maimed by the engines or cars of the railroad company upon that part of its road, said road being unfenced, or insufficiently fenced.
2. In an action against a railroad under Civil Code, Section 950, it is necessary that the petition allege plaintiff's ownership or possession of land along or through which the railroad runs, and that the stock was killed at such place.
3. In an action against a railroad under the statute, failure to deny an allegation of the answer that the place where the killing occurred was a public station amounted to an admission of such fact.
4. In an action under Civil Code, Section 950, no allegation of negligence in the operation of the train is necessary.
5. The statute does not require a railroad to fence at a station.
6. Where in an action against a railroad under Civil Code, Section 950, the only evidence was that the animals were found near the track, one dead and the other injured so that it had to be killed, and no showing was made as to the character of the injuries except that one had its legs broken, such evidence was insufficient to show that the animals were killed by an engine or cars of defendant.
7. Want of evidence to support a judgment may be relied on and considered upon an appeal from the judgment.

*Appeal from District Court, Silver Bow County; William Clancy, Judge.*

ACTION by Charles Beaudin against the Oregon Short Line Railroad Company. From a judgment in favor of plaintiff, defendant appeals. Reversed.

*Mr. John G. Willis, for Appellant.*

*Messrs. Kirk & Clinton, for Respondent.*

MR. COMMISSIONER CLAYBERG prepared the following opinion for the court:

This is an appeal from a judgment rendered against the railroad company for the alleged killing of certain stock. The only

allegation in the complaint upon which the liability of the railroad company is claimed to rest is as follows: "That on or about the 3d day of March, A. D. 1901, at a point on its railway known as 'Beaudin's Spur,' Silver Bow county, Montana, the said defendant, through and by reason of the carelessness of its servants, agents and employes, and by reason of failing to maintain good and sufficient fences on either or both sides of their track and property, as provided by Section 950 of the Civil Code of the state of Montana, with its engine and cars ran into, over and upon two certain male colts belonging to the plaintiff, whereby said colts received injuries from which they died, to the damage of the plaintiff in the sum of one hundred dollars, the value of the said colts so killed." To this complaint defendant answered, denying this allegation, and then averred that the place where the alleged killing took place was a public station and depot, and used as such. No replication was filed to this answer. At the trial of the case defendant objected to the introduction of any evidence on the ground that the complaint "does not state facts sufficient to constitute a cause of action." This objection was overruled. At the close of plaintiff's testimony defendant moved for a nonsuit on the same and other grounds. This motion was also overruled. After the introduction of defendant's testimony the cause was submitted to the jury, which rendered a verdict for the plaintiff. Judgment was entered upon this verdict, and the defendant appeals from the judgment.

1. The code commission in their final report of 1892 say of the Civil Code reported therein: "This Code is almost entirely taken from the Civil Code prepared by the Honorable David Dudley Field for the legislature of the state of New York and the Civil Code adopted by the state of California." (Sec. xxvii, Final Report of Comm.) No such section appears in the New York Code, so we conclude that Section 950 referred to in the complaint was adopted from California. It was reported by the code commission, and first appears in our Civil Code of 1895. The section of the present California Civil Code (Sec-

tion 485) first appears in the statutes of that state in the year 1861 (Section 40), and has been carried forward ever since.

It was undoubtedly the intention of the legislature to adopt this section of the California statute *verbatim*. It did so with the exception of three words, which were undoubtedly omitted by mistake, and the use of the word "and" for "are" in another part of the section. Section 950, at the point where this omission occurs, reads as follows: "In case they do not make and maintain such fence, if their engine or cars shall kill or maim any cattle or other domestic animals upon their line of road which passes through or along the property thereof." This part of the section is incomplete, and almost unintelligible. To what antecedent does the word "thereof" refer? It is apparent that something was omitted. An examination of the statute of California above referred to fully explains this omission. The same portion of the statute of that state reads as follows: "In case they do not make and maintain such fence, if their engine or cars shall kill or maim any cattle or other domestic animals upon their line of road which passes through or along the property of the owners thereof." With this insertion the statute becomes plain and intelligible. But upon reading the remainder of Section 950 it is apparent that the legislature had under consideration and intended to enact a law requiring a railroad company, whenever it located its line of road along or through the property of an owner of land, to require it to fence the side of its line next to such property if it was laid along the same, or both sides of the track if it was laid through such property, or to pay to the owner of such land the market value for all his stock killed by the railroad company on the line of road passing through or along such property, "unless it occurred through the neglect or fault of the owner of the animal so killed or maimed," and unless the latter part of the section had been complied with. We shall therefore construe the first part of Section 950 according to its evident intended meaning, and hold that it applies only to stock belonging to the owner or one in possession of land along or through which the railroad passes, which has been

killed or maimed by the engines or cars of the company upon that part of its road, said road being unfenced, or insufficiently fenced. The complaint does not bring this case within the purview of the section so construed. It does not allege the ownership or possession of any land along or through which the railroad runs to be in the plaintiff, or that the stock was killed at such place. These allegations are essential to a sufficient complaint under this section. (*Baker v. So. Cal. Ry. Co.*, 114 Cal. 501, 46 Pac. 604; *Baker v. So. Cal. Ry. Co.*, 126 Cal. 516, 58 Pac. 1055; *Boyd v. So. Cal. Ry. Co.*, 126 Cal. 571, 58 Pac. 1046.)

2. The complaint shows that the stock was killed at Beaudin's Spur. The answer avers that Beaudin's Spur is a public station or depot, and used as such. No replication was filed to this answer, and therefore these allegations must be taken as true. This being the case, no duty devolved upon the railroad company to fence the railroad at that point. (*Baker v. So. Cal. Ry. Co.*, *supra*; *Moses v. S. P. R. R.*, 18 Oregon, 385, 23 Pac. 498; *Lloyd v. Pac. R. R.* 49 Mo. 199; *Morris v. St. L., K. C. & N. R. R.*, 58 Mo. 78; *Swearingen v. M., K. & T. R. R.*, 64 Mo. 73; *Kyser v. K. C., St. J. & C. B. R. R. Co.*, 56 Iowa, 207, 9 N. W. 133, and cases cited.) No allegation of defendant's negligence in the operation of its trains is necessary to render it liable under Section 950. We need not consider whether the complaint contains general allegations of negligence sufficient to constitute a cause of action, because the proof was barren of all negligence on the part of defendant.

3. The evidence introduced at the trial and incorporated in the record by way of bill of exceptions does not support the verdict and judgment. There is a complete want of proof of any negligence on the part of defendant. There is no evidence as to whether the animals were killed or maimed by the engines or cars of the railroad company. The only evidence contained in the record in that regard is that the animals were found near the track, one dead and the other maimed so that it had to be

killed. No showing is made as to the character of injuries to either of the animals, except that one had its legs broken. All of this may have occurred from some other causes as well as from being struck by an engine or train. Whether the one killed or the injury to the other was caused by defendant's engine or cars was directly in issue under the pleadings, and the burden of establishing the allegations of the complaint was upon plaintiff. The mere finding of the bodies near the railway track is not of itself sufficient proof that they were killed by the engine or cars of the railway company. (*Union Pac. R. R. v. Bullis*, 6 Colo. App. 64, 39 Pac. 897.) The evidence is entirely wanting in several other important particulars which are not necessary to discuss. Want of evidence to support the judgment may be relied upon and considered upon an appeal from the judgment. (*Ball v. Gussenhoven*, 29 Mont. 321, 74 Pac. 871, and cases cited.) Counsel for respondent insists that the record does not contain all the evidence given on the trial. We are clearly of the opinion that the recitals contained in the bill of exceptions and the certificate of the judge settling the same are sufficient to disclose that it contains all, or the substance of all, the evidence given at the trial bearing upon the errors alleged.

There are other defects in the complaint and proof which require no notice.

We are therefore of the opinion that the complaint does not state facts sufficient to constitute a cause of action under Section 950 of the Civil Code, and that the verdict is not supported by the evidence. The judgment must therefore be reversed, and we so advise.

PER CURIAM.—For the reasons stated in the foregoing opinion, the judgment is reversed, and the cause remanded.

HELENA WATER WORKS COMPANY, RESPONDENT, v.  
CITY OF HELENA ET AL., APPELLANTS.

31	243
40	504
40	505

(No. 2,013.)

(Submitted May 23, 1904. Decided October 20, 1904.)

*Municipal Corporations — Indebtedness—Current Expenses—  
Installation of Water System.*

1. Under Session Laws 1903, page 42, providing that, even after a city has reached the constitutional limit of indebtedness, it still has power to pay its reasonable and necessary current expenses out of the cash in its treasury, the determination of what is a current expense is for the courts; but the determination of the city council as to whether a particular current expense is reasonable and necessary is not subject to review by the courts in the absence of fraud or abuse of discretion.
2. Session Laws 1903, page 42, was passed immediately after a holding by the supreme court that a city which had reached the constitutional limit of indebtedness had no power to pay out funds for any purpose, and provided that, even after a city had reached the constitutional limit of indebtedness, it should still have power to manage and conduct its affairs on a cash basis, and pay its reasonable and necessary current expenses. *Held*, that an expenditure to install and operate a water system to belong to the city is not for current expenses, and not authorized by the statute.

*Appeal from District Court, Lewis and Clarke County; J. M. Clements, Judge.*

ACTION by the Helena Water Works Company against the city of Helena and others. From a judgment for plaintiff, defendants appeal. Affirmed.

*Mr. Edward Horsky*, for Appellants.

*Messrs. Carpenter & Carpenter*, and *Mr. M. S. Gunn*, for Respondent.

MR. JUSTICE HOLLOWAY delivered the opinion of the court.

On October 23, 1903, the Helena Water Works Company commenced an action in the district court to secure an injunction

restraining the city of Helena and its executive officers from entering into a contract to purchase certain water pipes, fire hydrants, etc., and from paying for the same.

It is alleged in the complaint that the city is and has been for several years last past continuously indebted in excess of three per centum of the valuation of all the taxable property within the city; that pursuant to an order of the city council the city has caused to be published a notice, the material portion of which is as follows:

“Bids Wanted.

“Notice is hereby given that until Monday, twelve (12) o'clock noon, October 19, 1903, the city of Helena, Montana, will receive sealed proposals, in accordance with specifications, for entering into a contract, to be awarded to the lowest responsible bidder, for furnishing one hundred and seventy-seven (177) tons of cast iron pipe, specials, eleven (11) fire hydrants, lead, jute, packing, gate valves, etc., such materials to be used on Main street as part of water system. Terms cash: \* \* \*”

“Edward Hprsky, City Clerk.”

It is further alleged that the city of Helena does not own or control any water system, and has never supplied itself or its inhabitants with water, but that the city and its inhabitants have been supplied with water by the plaintiff company under a franchise owned by it and granted to it by the city of Helena; that it is the purpose of the city of Helena to make the pipe, hydrants, etc., mentioned in the notice above, a part of a water system which it is the purpose of the city to install, own, control and operate. It is further alleged that the city council has made an appropriation of \$12,000 out of the funds received from taxes collected by the city for general municipal and administrative purposes for the payment of the pipe and other materials mentioned above. It is then alleged that, unless restrained by the court, the city will enter into a contract for the furnishing of the pipe and other materials mentioned in the notice; that a further indebtedness of the city will thereby be incurred; that



the mayor and city clerk will issue a warrant for the payment of such materials; and that the treasurer, upon presentation, will pay such warrant, and thereby misappropriate a large amount of the funds belonging to said city.

The answer admits all the allegations of the complaint, except the allegation that a further indebtedness on behalf of the city will be created, that a warrant to pay for the materials mentioned in the notice will be issued, or that there will be any misappropriation of city funds. It is also alleged in the answer as follows: "That under the conditions existing on said Main street, in the city of Helena, and with which said city is and has been confronted at all times within the year last past, and immediately prior to the commencement of this action, the said appropriation and expenditure was, by the city council, in the exercise of its business functions and discretion, deemed and considered a reasonable, necessary and current expense of said city of Helena." No reply was filed.

Thereafter the plaintiff and the defendants each filed a motion for judgment on the pleadings. The motion of the defendants was overruled, the motion of the plaintiff sustained, and a judgment in favor of the plaintiff entered granting the relief sought in the complaint; from which judgment this appeal is prosecuted.

In *State ex rel. Helena Water Works Co. v. City of Helena*, 24 Mont. 521, 63 Pac. 99, 55 L. R. A. 336, 81 Am. St. Rep. 453, this court intimated that it would be competent for the city of Helena, even though the constitutional limit of indebtedness had been reached, to continue to transact its business on a cash basis. However, in *Helena Water Works Co. v. City of Helena*, 27 Mont. 205, 70 Pac. 513, it was held that the intimation given in the former opinion was merely *obiter*, and erroneous, for the reason that under Sections 4811, 4812, Political Code, then in force, before any claim against the city could be paid, such claim must be presented to the city council, audited by it, an indebtedness on the part of the city established, a warrant for the amount

of such indebtedness drawn, and such warrant duly presented for payment. The effect of this decision was to deny to the city of Helena and other cities which had reached the constitutional limit of indebtedness power or authority to proceed with the management of the business affairs of such cities, unless all work performed for or materials furnished to them be done gratuitously; and, as such a condition of affairs is not within reason, the actual effect was to stop the corporate existence of such municipalities until some relief could be had at the hands of the legislature, for the court specifically decided that no funds can be paid out until an indebtedness is first established, and, as the limit of indebtedness had been reached already, no funds could be paid out at all (special assessments excepted).

This decision was rendered November 10, 1902. On February 25, 1903, the Eighth Legislative Assembly passed an Act entitled "An Act to amend Sections 4811, 4812, of Article IV, of Chapter III, Title III, Part IV, of the Political Code of the State of Montana, relating to legislative powers of cities and towns." (Session Laws 1903, Chapter 30.) Those sections, as amended, now particularly provide that, even after a city has reached the constitutional limit of indebtedness, it still has power (1) to manage and conduct its business affairs on a cash basis, and pay its reasonable and necessary current expenses out of the cash in its treasury derived from its current revenues; (2) in the event it makes such payment in advance, to require indemnity or security in the form of a cash deposit, to be held by the city treasurer; (3) before payment of the current expenses, to set apart sufficient money to pay the interest on its outstanding indebtedness, and to create any sinking fund for which provision is made.

Considering the foregoing amendments, then, in the light of the history surrounding their enactment and the decision of this court to which reference has just been had, and which must be deemed to have been in the legislative contemplation in making such amendments, it is apparent that the purpose of the legis-

lature was to furnish some remedial measure which would permit such municipalities to live.

Section 4800, Political Code, specifies the items of expense which a city that has not reached the constitutional limit of indebtedness may incur. The list of items is a long one, and evidently was meant to include every species of expense necessary to the existence, well-being and prosperity of such municipality. If the legislature, in amending Sections 4811 and 4812, above, had intended to extend to municipalities laboring under the disability surrounding the city of Helena by reason of its having reached the constitutional limit of indebtedness, authority to incur any or all of those items of expense enumerated in Section 4800, terms sufficiently broad to indicate such purpose would doubtless have been employed. But, on the contrary, the legislative assembly made use of qualifying terms, which seem to indicate a purpose to limit the items to such only as are actually necessary to corporate existence. The terms used are "reasonable and necessary *current* expenses."

In the first place, then, under these amendments the city of Helena cannot pay any expense until provision is first made for interest on its outstanding indebtedness and for any sinking fund which the city may have undertaken to create. Then its authority to make expenditure of public money is limited not only to paying current expenses, but further limited to such current expenses only as are both reasonable and necessary. While it was left to the courts to determine what was meant by the expression "current expense," it was a matter exclusively for the city council to determine whether a particular current expense was reasonable and necessary, and a determination by the city council of such question would not be subject to review by the courts, in the absence of fraud or abuse of discretion. (1 Dillon on Mun. Corp., 4th Ed., Sec. 94; *East St. Louis v. Zebley*, 110 U. S. 321, 4 Sup. Ct. 21, 28 L. Ed. 162.)

The expression "current expense" is not found in Section 4800, above, which grants to city councils authority to incur

expense, and therefore that expression must be given the meaning which was intended by the legislature in amending Sections 4811 and 4812, above, if that can be ascertained. The word "current" means "running, now passing, common," (Webster's International Dictionary.) The term was doubtless used by the legislature to distinguish the common, recurring, running expenses of a city from such expenses as partake of the nature of an investment, or such as are to be incurred in a substantial or permanent improvement. In other words, the city may incur such necessary, reasonable expense as is requisite to the corporate existence of the city. If the city may incur any expense enumerated in Section 4800, then the qualifying term "current," made use of by the legislature in amending Sections 4811 and 4812, is meaningless. It was certainly not intended to place a premium upon extravagance or improvidence. Neither was it intended that a city which has reached the constitutional limit of indebtedness shall enjoy greater freedom in the expenditure of public money than a city which has kept well within the limits prescribed by the fundamental law of the state.

The record discloses that the city of Helena and its inhabitants are furnished with water by a corporation existing under a franchise granted to it by the city of Helena. It is further disclosed that the purpose of the city in soliciting the bids called for was to install and operate a water system which should belong to, and be under the control of, the city itself; and, while the object to be sought by the city may be ever so praiseworthy, the expenditure partakes so much of the nature of an investment in a permanent improvement that it cannot have been in the contemplation of the legislature when it limited the authority of the city of Helena to incur only necessary and reasonable *current* expenses.

If a city has so wisely administered its financial affairs that it has not reached the constitutional limit of indebtedness, every expenditure of public money made by it must be made under the very eyes of its inhabitants, any one of whom is afforded an opportunity to inspect the items of the proposed expenditure

and register his objection to such as may appear to him unwise or unnecessary; for in such case every item of proposed expenditure must be incorporated in an itemized bill, duly verified, filed with the city council, audited and allowed before payment can be ordered. But the city which has reached the limit of indebtedness may proceed to pay for its reasonable, necessary *current* expenses without any bills for the same ever having been made out, and with no opportunity whatever for interested taxpayers to inquire into or contest the allowance of any items of such expense.

The city which has been so unfortunate as to reach the constitutional limit of indebtedness must be content thereafter, while such disability exists, to maintain corporate existence, leaving any and all improvements not necessary to such existence for future efforts, when, by this forced economy, the city may so far reduce its indebtedness as to be able to take its place among other cities of the state which do not labor under this disability.

The legislature, in its wisdom, made provision for such continued existence, but employed terms in so doing, such as seem to indicate a legislative purpose to limit expenditure of public money to those items of expense only which may properly be designated as living expenses.

We are of the opinion that the answer states no defense, and the judgment is affirmed.

*Affirmed.*

MR. CHIEF JUSTICE BRANTLY and MR. JUSTICE MILBURN  
concur.

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SHELDON, RESPONDENT, v. POWELL, APPELLANT.

(No. 1,953.)

(Submitted October 1, 1904. Decided October 27, 1904.)

*Deeds — Failure to Record — Subsequent Purchaser — Good Faith — Burden of Proof — Evidence — Appeal from Judgment.*

31	249
31	599

1. Payment of taxes by the grantee in an unrecorded deed is not notice to a subsequent purchaser.
2. The burden is on the grantee in an unrecorded deed to show that a subsequent purchaser had notice.
3. After conveyance to plaintiff by a deed which was not recorded, the grantor applied to defendant for a loan on the land, stating that it was fenced, and a part of it plowed. Defendant examined the title, and went to the land, finding more plowed than had been represented, and also that the fence inclosed other land which belonged to plaintiff. *Held*, that defendant was guilty of no fraud in taking a conveyance of the land as security for the loan.
4. On appeal from the judgment only, the record may be examined to determine whether there is any evidence to support the finding.

*Appeal from District Court, Cascade County; D. F. Smith, Judge.*

ACTION by Frank Sheldon against Frank E. Powell. From a judgment for plaintiff, defendant appeals. Reversed.

*Mr. Ransom Cooper*, for Appellant.

Citing: *Hull v. Diehl*, 21 Mont. 71; *Le Neve v. Le Neve*, Ambler, 436; *Shotwell v. Harrison*, 22 Mich. 425; *Smith v. Yule*, 31 Cal. 180; *Fair v. Stevenot*, 29 Cal. 490; *Scheerer v. Cuddy*, 85 Cal. 270; *Pell v. McElroy*, 36 Cal. 268; *Emeric v. Alvarado*, 27 Pac. 356; Civil Code, Secs. 1641, 1644, 1651; *Brown v. Volkening*, 64 N. Y. 76; *Page v. Waring*, 76 N. Y. 465; *Crossen v. Oliver*, (Ore.) 61 Pac. 885; *Godfrey v. Disbro*, Walker's Ch. Reports, 265; *Atwood v. Bearss*, 47 Mich. 72; *Ely v. Wilcox*, 20 Wis. 551.

*Mr. Preston H. Leslie*, and *Messrs. Greene & Cockrill*, for Respondent.

The possession of the grantee under a prior deed is notice of the title under which he claims. (Tiedeman on Real Property, Sec. 1819.) This rule arises from the common-law feoffment and livery of seisin.

Where a party has an equity and also actual possession of the property, a purchaser of the legal title from the grantor out of

possession is bound to take notice of the equity; and the result should be the same whether the possession is deemed to impart notice *per se*, or is treated as evidence of notice. (*Stoneseifer v. Kilburn*, 122 Cal. 659; *Hyde v. Mangan*, 88 Cal. 319; *Haddock v. Wilmarth*, 5 N. H. 188.)

Open, notorious and exclusive possession of real estate is sufficient to put a purchaser upon inquiry as to the interest, legal or equitable, held by the possessor. (*Dutton v. Warschauer*, 21 Cal. 609; *Scheerer v. Cuddy*, 85 Cal. 270.)

"The actual possession of land, with the exercise of the usual acts of ownership, operate in law as constructive notice to all the world of the claim of title under which the possessor holds." (*Talbot v. Singleton*, 42 Cal. 391; *Pritchard v. Brown*, 17 Am. Dec. 431; *New v. Wheaton*, 24 Minn. 406; *Brown v. Gaffney*, 28 Ill. 149.)

"One who purchases and obtains a conveyance of land at the time in the open and notorious possession of another who has a prior deed, takes notice of the title under the unrecorded deed." (*Landers v. Bolton*, 26 Cal. 393; *Daubenpeck v. Platt*, 22 Cal. 330; *Toland v. Torey*, 24 Pac. 191.)

"Open and notorious and exclusive possession of a prior grantee in an unrecorded deed is sufficient to put a subsequent purchaser whose deed is first recorded upon inquiry, and such possession is sufficient evidence of notice unless a subsequent purchaser make due inquiry and fails to attain knowledge of the unrecorded deed." (*Fair v. Stevenot*, 29 Cal. 486.)

"And the failure to make inquiry places the second purchaser in no better light than if he had ascertained the real claim of the occupant." (*Scheerer v. Cuddy*, 85 Cal. 273; *Hyde v. Mangan*, 88 Cal. 319.)

"The presumption of knowledge can only be rebutted on the part of the second purchaser or those claiming under him by explicit proof of diligent and unavailing effort by the vendee to discover or obtain actual notice of any legal or equitable rights of the party in possession." (*Pell v. McElroy*, 36 Cal.

269; *O'Rourke v. O'Connor*, 39 Cal. 447; *Bank of M. v. Baker*, 82 Cal. 117, commenting on *Fair v. Sterenot*, 29 Cal. 490; *Scheerer v. Cuddy*, 85 Cal. 273.)

"One who purchases land in the possession of a third person has no right to rely upon the record title alone in making the purchase, but is bound to look beyond the record title for the purpose of ascertaining what right and equities, if any, the party in possession has in the premises." (*Security Loan & Trust Co. v. Wilamette Steam Mills*, 99 Cal. 636; *Brighton v. Doyle*, 25 Atl. 694.)

That the testimony and evidence does tend to prove the contention of the plaintiff is beyond a question of doubt. Our statute, Section 488, Code of Civil Procedure, indicates what is possession under a paper title. "The burden of proof of inquiry is upon the second purchaser." (*Scheerer v. Cuddy*, 85 Cal. 270; *Wallace v. Moody*, 26 Cal. 387; *Heman v. Levy*, 55 Cal. 118; *Pell v. McElroy*, 36 Cal. 268; *Havens v. Dale*, 18 Cal. 359.)

"Whatever will put one on inquiry is enough." (*Sigourney v. Munn*, 7 Conn. 324; *Troup v. Hurlbert*, 10 Barb. 354; Sec. 4667, Civil Code of Montana; *McAdow v. Black*, 6 Mont. 601-608.)

The appeal is from the judgment, and not from an order overruling a motion for a new trial, and therefore the evidence is not before the court as to its sufficiency. (*Emerson v. Eldorado Ditch Co.*, 18 Mont. 257; *Withers v. Kemfer*, 25 Mont. 432; *Largey v. Sedman*, 3 Mont. 476; *Lloyd v. Sullivan*, 9 Mont. 589.)

MR. COMMISSIONER POORMAN prepared the following opinion for the court:

This is an action to quiet title to certain lands situate in Cascade county; the plaintiff claiming title to them under a deed, and seeking to set aside a subsequent conveyance made to the defendant, which was recorded prior to the plaintiff's deed. The



questions involved were submitted to a jury, which found for the plaintiff. The court adopted the findings of the jury and rendered judgment for the plaintiff. Defendant has appealed from the judgment.

The material facts appearing in the record are that one Gus Streid made final proof on his homestead entry on February 10, 1900; that on that or the succeeding day he conveyed the land to the plaintiff by a deed; that the final receipt issued by the receiver to Streid was never recorded, and the deed executed and delivered by him to the plaintiff was not recorded until March 14, 1901; that the plaintiff, immediately after the execution of the deed to him, took possession of the land, made some improvements by plowing and farming the same during the year 1900, and also seeded a part of the land in the spring of 1901, leaving some of his farming implements on the ground; that plaintiff had fenced the land, inclosing it in large fields with other land owned by him; that the land was assessed to plaintiff in 1900 and 1901; that he paid taxes thereon, but that plaintiff never resided upon the land; that early in March, 1901, Streid made application to one Sires to obtain a loan. Sires, not desiring to loan money at this time, introduced Streid to the defendant, to whom Streid then made application for the loan, offering this land as security. Defendant desiring to see the land, Streid procured a team and went with the defendant, and they together looked over the land; Streid telling the defendant that he had fenced the land, and had plowed about twenty acres of it. There was no one on the land at this time, nor was there any house on it, except a broken-down shack that was uninhabitable. Defendant then returned to Great Falls, went to the office of the county clerk and recorder, and examined the title to the land, and found that the only instrument on record relating thereto was the government patent to Streid, which Streid then had in his possession, dated November 28, 1900, and recorded March 6, 1901. Defendant then loaned Streid \$350, and as security therefor, on March 11, 1901, Streid executed and de-

livered to defendant a bargain and sale deed to the land, which deed was recorded March 11, 1901, three days prior to the recording of plaintiff's deed. The question is, which of these deeds, under this state of facts, should take the preference?

Section 1641 of the Civil Code provides: "Every conveyance of real property other than a lease for a term not exceeding one year, is void as against any subsequent purchaser or incumbrancer, including an assignee of a mortgage, lease, or other conditional estate, of the same property, or any part thereof, in good faith and for a valuable consideration, whose conveyance is first duly recorded." This section unequivocally makes all unrecorded deeds and conveyances, except leases for one year, void as to subsequent purchasers and incumbrancers in good faith and for a valuable consideration. Section 1644, however, provides: "An unrecorded instrument is valid as between the parties and those who have notice thereof." It therefore becomes material to inquire what kind of notice is required by this latter section—whether possession is sufficient notice, and, if so, what kind of possession; whether the payment of taxes is sufficient notice, and on whom is the burden of proof?

Before the enactment of the recording laws, the only means a purchaser had of ascertaining whether his grantor had made a prior conveyance was by inquiry of the party in possession of the land, if occupied, and of those living in the vicinity. Long experience demonstrated that title or claim to title predicated upon information received by inquiry of those who had no right to inquire into the prior ownership of land in which they had no interest, and whose conclusions might therefore be based upon casual observation or rumor, was productive not only of error, but actual fraud. To avoid what thus proved to be an evil, recording laws were enacted. These laws not only serve the double purpose of protecting *bona fide* purchasers and of affording owners of land an opportunity of preserving their evidence of title, but of affording an opportunity for the acquisition of information in the preparation of valuable statistics relative to

economic conditions, and also of aiding in the preparation of assessment lists. If the same inquiry must be made now as before the laws were enacted, of what use are these laws to the purchaser? We do not understand that such is the contention of counsel, but these laws undoubtedly at least limit the extent of such inquiry.

Chief Justice Campbell, in the dissenting opinion filed by him in *Shotwell v. Harrison*, 22 Mich. 426, says: "The leading case of *Le Neve v. Le Neve*, Ambler, 436, was the first in which it was held that a priority of record could be assailed in any court, and the doctrine has ever since been maintained that it may be done, but only by the most convincing proof of fraud, by notice or by want of consideration which raises a constructive fraud. Fraud is the only ground of interference, and it cannot be presumed. The doctrine which assumes this without proof is at war with all the recognized legal presumptions, and I cannot but regard it as dangerous and unreasonable."

In *Page v. Waring*, 76 N. Y. 463, it is said: "Such possession under an unrecorded deed as will amount to notice to a subsequent purchaser must be under the unrecorded deed, and must be actual, open and visible, so that the subsequent grantee could go upon the lands and obtain by inquiry there information of the unrecorded deed." The same doctrine is held in *Brown v. Volkening*, 64 N. Y. 76.

In *Crossen v. Oliver*, 37 Oregon, 514, 61 Pac. 885, the Supreme Court of Oregon sustained the following instruction with reference to a similar question: "The notice that will render a party a lienholder in bad faith must be something more than would excite the suspicion of a cautious and wary person. It must be so clear and undoubted with respect to the existence of a prior right as to make it fraudulent in him afterwards to take and hold the property. In this case notice or knowledge that would bind Turner Oliver, and render his judgment subject to the unrecorded deed of Crossen, must be either actual knowledge of the existence of this deed, or actual notice of such facts and

circumstances as would have enabled him, by following up such information, to have ascertained that Crossen held this deed and claimed this land."

In *Godfroy v. Disbrow*, Walk. Ch. (Mich.) 260, it is held "that the presumption of law is that a subsequent purchaser who has got his deed first recorded is a *bona fide* purchaser without notice, until the contrary is made to appear." See, also, *Atwood v. Bearss*, 47 Mich. 72, 10 N. W. 113.

The payment of taxes on this land by the plaintiff was not of itself, under the law, constructive notice to the defendant that the plaintiff owned or claimed it.

These three questions herein discussed were reviewed by this court in the well-considered case of *Mullins v. Butte Hardware Co.*, 25 Mont. 525, 65 Pac. 1004, 87 Am. St. Rep. 430, in which the court said: "The law is well settled that the actual, visible, notorious, continuous, exclusive and unequivocal possession of a definite tract of land by one rightfully in possession or holding under a valid title is a constructive notice to subsequent purchasers and incumbrancers of whatever estate or interest in the land is held by the occupant, equivalent in its extent and effects to the notice given by the recording or registration of his title." (2 Pomeroy's Equity Jurisprudence, Sec. 615.) Such possession is evidence of some right or title in the occupant, and is sufficient to put a subsequent purchaser or incumbrancer on inquiry as to the rights of the person then in possession." Exceptions are then given to this general rule. The court further says: "The suggestion that the records of the county treasurer's office showing that each of several occupants paid taxes on the parcel of ground in his possession were sufficient to put the appellants upon inquiry has already been considered, but may be further answered by saying that such records are not of themselves constructive notice to purchasers or incumbrancers of the fact that certain persons have paid taxes. We are not advised of any statute which declares the record of the payment of taxes to have that effect." Quoting from the decision in

*Hull v. Diehl*, 21 Mont. 71, 52 Pac. 782, the court further says: "We are, however, satisfied that the good faith of the purchaser will sufficiently appear by proof of the record of conveyances showing title in his grantor at the time of the purchase, upon which record he had the right to rely, and is presumed to have relied. If he had actual notice of the prior conveyance, this is a fact affirmative in its nature, and it is therefore more reasonable to require it to be shown by the party claiming under the prior unrecorded deed than to call upon the purchaser to prove the negative." The court also quotes with approval a part of the decision in *Anthony v. Wheeler*, 130 Ill. 128, 22 N. E. 494, 17 Am. St. Rep. 288, note, to the effect "that one claiming title to land by a deed to him purporting to be made for a valuable consideration is presumed to be a purchaser in good faith, without notice of prior unrecorded deeds, until the contrary is shown, and that the burden of proof to show notice and want of good faith is on the party attacking the deed."

In the trial of the case at bar the burden was by the trial court cast upon the defendant to show that he was not guilty of fraud in taking this second conveyance. This was error, for, under the decision in the *Mullins Case*, above quoted, the burden was upon the plaintiff to show that the defendant had notice, either actual or constructive, of this prior unrecorded deed.

The evidence in this cause not only fails to show that the defendant was guilty of any fraud whatsoever in accepting this second conveyance, but does show that the defendant had taken all the precaution which the law required of him. Streid was introduced to him by a friend, and made application for a loan. The defendant did not solicit the purchase of the land, but, after the application was made, he went to the land in company with Streid. Streid told him that he had fenced the land, and had plowed a part of it. He found nothing to indicate that Streid's statements were not true. The defendant then went to the records, and found that there had been no conveyance recorded except the patent from the United States to Streid, and Streid had possession of the patent. The mere fact that the fence in-

closing the land also inclosed other lands, or that there was more land plowed than Streid estimated that he had plowed, were in no manner contradictory of the recorded title in Streid.

It is contended that, as this is an appeal from the judgment only, resort to the record may not be had to determine the sufficiency of the evidence. This is the rule where there is any substantial conflict in the evidence; but this court may examine the record to determine whether, as a matter of fact, there is any evidence to support the findings. (*Whalen v. Harrison*, 26 Mont. 316, 67 Pac. 934; *Mahoney v. Dixon*, 31 Mont. 107, 77 Pac. 519.) An examination of the record discloses that there is not any evidence to support the findings of the court, and for this reason we recommend that the judgment be reversed and the cause remanded.

PER CURIAM.—For the reasons given in the foregoing opinion, the judgment is reversed and the cause remanded.

31 258  
31 345

STATE EX REL. GRISSOM ET AL., RELATORS AND RESPONDENTS, v. JUSTICE COURT OF TOWNSHIP  
NO. 1, GALLATIN COUNTY, ET AL.,  
DEFENDANTS AND APPELLANTS.

(No. 1,956.)

(Submitted October 17, 1904. Decided November 4, 1904.)

*Appeal—Scope of Review—Justice of the Peace—Assignments of Error—Writ of Review—When Lies.*

1. An appeal from a judgment of the district court on a writ of review to a justice of the peace brings up for review only such questions as appear on the judgment roll, and other papers are not before the court.
2. So far as *certiorari* proceedings are concerned there is no distinction between the justice of the peace court of a township presided over by S. justice of the peace, and S. justice of the peace of the township, so that

notice of appeal in the name of the justice is sufficient to give jurisdiction; the authority of the "justice of the peace" and the "justice of the peace court" being identical.

3. It is not necessary for the appellant to assign his reasons in the specifications of error contained in his brief.
4. Under Code of Civil Procedure, Section 1941, to entitle one to a writ of review from the district court it must appear that the inferior tribunal was performing some judicial act, that such tribunal exceeded its jurisdiction, and that there is no appeal or other speedy and adequate remedy.
5. Where defendant appears in a justice court, and files an answer, and the trial is then adjourned to a day certain, a judgment by default cannot be entered on such trial, though defendant does not then appear and take part in the trial.
6. Under Code of Civil Procedure, Section 1761, providing that all appeals from the justice's court must be tried anew in the district court, that court sits as a justice of the peace in that case, and with no greater jurisdiction, and either party may have reviewed any question of law or fact which was raised before the justice and presented to the district court.
7. Where appeal lies, *certiorari* will not lie.
8. Where defendants appear in an action before a justice, file their separate answers, and by stipulation agree to a particular time for trial, they are chargeable with actual notice of all subsequent proceedings, and, though they do not appear at said time, their remedy is by appeal, which excludes a remedy by writ of *certiorari*.

*Appeal from District Court, Gallatin County; W. R. C. Stewart, Judge.*

WRIT OF REVIEW in the name of the state, on the relation of F. E. Grissom and another, against W. Y. Smith, justice of the peace, to review proceedings in defendant's court wherein A. L. Love was plaintiff and F. E. Grissom and another were defendants. From the judgment rendered, defendant Smith appeals. Reversed.

*Mr. Eugene B. Hoffman*, for Appellant.

*Mr. John A. Luce*, for Respondents.

MR. JUSTICE HOLLOWAY delivered the opinion of the court.

On December 1, 1902, an action was commenced in the justice of the peace court of Township No. 1, Gallatin county, Montana, before W. Y. Smith, justice of the peace, wherein A. L. Love was plaintiff and F. E. Grissom and another were defendants.

The complaint contained four causes of action; the first for \$530.01, the second for \$8.35, the third for \$1.82, and the fourth for \$7.50. Upon the filing of this complaint a summons was duly issued and served, but upon motion of the defendants the service was quashed. A new summons was thereupon issued and served. On December 24th the defendants appeared and filed a demurrer, which was overruled, and on January 14, 1903, each of them filed a separate answer putting in issue the allegations of plaintiff's complaint. On February 13th plaintiff filed a reply, and by stipulation of counsel the cause was set for trial for March 23d. At the time set for trial the defendants failed to appear, and after waiting one hour the court entered their default, and plaintiff made proof. At the close of his evidence plaintiff asked leave of court to amend his complaint by substituting \$260 for \$530.01 in his first cause of action. The amendment was permitted, and the court thereupon entered a judgment in favor of the plaintiff according to the prayer of his complaint as amended. On March 31, 1903, the defendants sued out of the district court a writ of review directed to the justice of the peace court of Township No. 1, county of Gallatin, state of Montana, W. Y. Smith, justice of the peace, respondent. A transcript of the record of the justice of the peace court in the case of *Love v. Grissom et al.* was duly certified and transmitted, together with the original files in the case, to the district court. Upon the hearing the district court entered a judgment annulling the judgment entered in the justice of the peace court and rendering judgment for relators for their costs. In this judgment it is recited that the district court heard the matter upon the pleadings and return and upon the affidavits of W. Y. Smith, E. M. Reynolds and Eugene B. Hoffman, filed on behalf of respondent in the *certiorari* proceedings. From this judgment W. Y. Smith, the respondent in such proceedings, has appealed.

Certain questions of practice are presented for determination.

1. It is said that the district court had before it certain affidavits not contained in the writ of *certiorari* or in the return



thereto, which were considered by the court in determining that proceeding upon its merits, but which affidavits are not in the record before this court. Section 1944 of the Code of Civil Procedure provides that the writ of review must command the party to whom it is directed to certify to the court issuing the writ *a transcript of the record and proceedings*, that the same may be reviewed, etc. Section 1947 provides that the review upon this writ cannot extend further than to determine whether the inferior tribunal has regularly pursued the authority of such tribunal. Section 1948 provides that, when a full return has been made, the court must hear the parties, and may thereupon give judgment, either affirming or annulling or modifying the proceedings below. Section 1950 reads: "A copy of the judgment, signed by the clerk, entered upon or attached to the writ and return, constitute the judgment roll."

An appeal to this court from the judgment entered in the district court brings before us for review any questions appearing on the judgment roll, as described in Section 1950, above, and in the consideration of such questions no other papers than those mentioned in Section 1950 are or could be properly before this court.

2. It is contended by respondents here that the appeal in this instance was not taken by the justice of the peace court, but only by W. Y. Smith, the justice of the peace, and upon the authority of *State ex rel. Healy v. District Court*, 26 Mont. 224, 67 Pac. 114, 68 Pac. 470, it is urged that the appeal is ineffectual for any purpose. Section 1, Article VIII, of the Constitution, provides: "The judicial power of the state shall be vested in the senate, sitting as a court of impeachment, in a supreme court, district courts, justices of the peace, and such other inferior courts as the legislative assembly may establish in any incorporated city or town." The theory upon which the case of *State ex rel. Healy v. District Court*, above, was decided, was that under the Constitution and laws of this state there is a well-defined distinction between a particular district court

and the judge of that court, and the reason for this is apparent. The Constitution and laws have vested in the district court certain jurisdiction, and also have vested in the judge of the district court at chambers power to determine various judicial matters (Section 11, Article VIII, Constitution, and Section 171, Code of Civil Procedure); but nowhere is there lodged in the justice of the peace any authority to do or perform any judicial act aside from the authority vested in such justice of the peace as a court. In other words, the authority of the justice of the peace and of the justice of the peace court, so far as judicial matters are concerned, are identical. As the writ of review can only affect such inferior tribunals, boards and officers as exercise judicial functions, and as the justice of the peace, in contradistinction with the justice of the peace court, does not exercise judicial functions, but only does so as a court, it is apparent that, so far as these *certiorari* proceedings are concerned, there is no distinction whatever between the justice of the peace court of Township No. 1, Gallatin county, Montana, presided over by W. Y. Smith, justice of the peace, and W. Y. Smith, justice of the peace of Township No. 1, Gallatin county, Montana, as such; in other words, for the purpose of these proceedings they are one and the same thing. We are therefore of the opinion that the notice of appeal is sufficient to give this court jurisdiction.

3. It is contended that the specifications of error in appellant's brief are insufficient; but, aside from any consideration of the others, specifications numbered 1 and 5 are sufficient. They are as follows: "(1) The court erred in entertaining the writ after the return." "(5) The court erred in rendering a judgment contrary to and against law." It is not necessary for the appellant to assign his reasons in the specifications contained in his brief. Whatever reasons he may have for his contention are properly embraced in that portion of the brief devoted to his argument. Taking up these two specifications, then, and considering them together, we observe that, after the justice of the peace made his return, the district court had before it all

that was necessary to a determination of the vital point in controversy here, namely, will *certiorari* lie? Upon the affidavit filed the court doubtless felt justified in issuing the writ in the first instance, but when the return was duly made, and it appeared therefrom just what had been done in the justice of the peace court, the district court was able to determine whether *certiorari* was the proper remedy, and one which the applicants for the writ could invoke. Section 1941 of the Code of Civil Procedure provides, among other things, that the writ of review may be granted by the district court when an inferior tribunal exercising judicial functions has exceeded the jurisdiction of such tribunal, and there is no appeal, nor, in the judgment of the court, any plain, speedy and adequate remedy. To authorize the issuance of the writ, therefore, it must appear (1) that the inferior tribunal was performing some judicial act; (2) that such tribunal exceeded its jurisdiction; and (3) that there was no appeal, and, in the judgment of the court, no other plain, speedy and adequate remedy other than the writ of review. All these must concur to sustain the remedy by *certiorari*, and the absence of any one of them is fatal to it. (*State ex rel. King v. District Court*, 24 Mont. 494, 62 Pac. 820.)

It is conceded in this instance that the justice of the peace was proceeding in a matter in that court, that such court was exercising judicial functions, and for the purpose of this decision it may be admitted that in exercising such functions the justice of the peace court exceeded its jurisdiction. We are then called upon to determine the question, was there an appeal?

In the first place, we may say that this was in no sense a judgment by default. The defendants in the justice court had appeared and answered, but there is no provision in law requiring them to be present at the trial if they feel disposed to absent themselves. In *Clark v. Great Northern Ry. Co.*, 30 Mont. 458, 76 Pac. 1003, this court said: "We preface our consideration of the cause by saying that the justice of the peace could not enter the default of the railway company on December 22d, notwithstanding the justice's docket entry seems to indicate that

such was attempted. The defendant had on file an answer which put in issue the allegations of the complaint, and, notwithstanding the entry made by the justice of the peace at the time of the trial, the record does show that the justice tried the issues and entered judgment on the proof adduced by the plaintiff, so that the judgment was in no sense a judgment by default, and could not have been. *Corart v. Haskins*, 39 Kan. 574, 18 Pac. 522; 9 Ency. Law, 2d Ed., 168, and cases cited; 6 Ency. Pleading and Practice, 60." The doctrine announced above is particularly applicable to the facts of this case. The judgment entered by the justice of the peace was not a judgment by default, notwithstanding the justice's record may contain an entry to that effect.

Section 1761 of the Code of Civil Procedure provides that all appeals from a justice court must be tried anew in the district court. Each party has the benefit of all legal objections made in the justice court, and when a judgment is reversed or set aside on a question of law arising in a justice court the district court must either try the case anew or render a judgment. The argument of counsel that on an appeal to the district court the cause must be tried *de novo*, and that the objections made in the justice of the peace court cannot be reviewed, is not well founded. There can be no misunderstanding of the meaning of Section 1761, above. It is true that the action is tried *de novo*, but on such trial the district court, to all intents and purposes, sits as a justice of the peace court. Its jurisdiction in that particular appeal is no greater than the jurisdiction of the justice of the peace court, and either party may have reviewed any question of law or fact which was properly raised in the justice of the peace court and is properly presented in the district court. (*Clark v. Great Northern Ry. Co., supra.*)

It is contended by respondent that, even if there is an appeal in this instance, the remedy by appeal is not plain, speedy and adequate, and therefore *certiorari* ought to lie, and in support of that contention *State ex rel. Johnson v. Case*, 14 Mont. 520,

37 Pac. 95, is cited. That case was decided in 1894. Subsequent to that date this court in numerous cases has particularly disavowed the doctrine therein announced, and it may be considered settled now as the law of this state that, if an appeal lies, *certiorari* will not. (*State ex rel. King v. District Court*, above; *State ex rel. Prescott v. District Court*, 27 Mont. 179, 70 Pac. 516; *State ex rel. Reynolds v. Laurandean*, 27 Mont. 522, 71 Pac. 754.)

Furthermore, in order that *certiorari* will lie, it must not only appear that there is not any other plain, speedy and adequate remedy, but it must affirmatively appear that there is no appeal. In this instance, on the contrary, it does affirmatively appear that defendants in the case of *Love v. Grissom* appeared in the action, filed their separate answers, and by stipulation agreed to a particular time for the trial, and they must then be charged with actual knowledge of all subsequent proceedings in the cause. They invoked the aid of *certiorari* before the time for appeal had expired. They had a remedy by appeal, and that excludes the remedy by the writ of review.

The judgment of the district court is reversed, and the cause remanded, with direction to that court to dismiss the *certiorari* proceedings.

*Reversed and remanded.*

MR. JUSTICE MILBURN concurs.

MR. CHIEF JUSTICE BRANTLY, not having heard the argument, takes no part in this decision.

Rehearing denied December 16, 1904.

McCORMICK, APPELLANT, v. JOHNSON ET AL.,  
RESPONDENTS.

(No. 1,957.)

(Submitted October 18, 1904. Decided November 4, 1904.)

*Statute of Frauds—Promise to Pay Debt of Another—Original  
Objection—Evidence — Admissibility—Sufficiency—Harm-  
less Error.*

1. A promise by partners to pay an existing debt of a corporation to another in consideration of such other person giving them an agency for sale of his coal is an original obligation, which, under Civil Code, Section 3612, Subd. 3, need not be in writing.
2. Evidence in an action for commissions for selling coal held sufficient to sustain a finding that plaintiff, in consideration of his agency for defendants, agreed to pay a debt owing them by another.
3. Evidence in an action for commissions held sufficient to sustain a finding that plaintiff's indebtedness to defendants equaled the amount of the commissions.
4. Where defendants claim that a certain contract was made with plaintiff's firm, which plaintiff denies, and according to defendants' claim it was made with both members of the firm, evidence as to whether plaintiff authorized his partner to enter into the contract for the firm is immaterial.
5. Any error in allowing plaintiff on cross-examination to be asked how a certain account stood is harmless, he having answered that he did not know.
6. Defendants who, in an action against them for commissions earned by a firm, claim that for a valuable consideration the firm agreed to pay the debt of an insolvent corporation to them, may testify that they received nothing from the assignee of the corporation.
7. Defendants, for the purpose of showing that the promise of plaintiff's firm to pay a debt owing them by a corporation was for a valuable consideration, and so not within the statute of frauds, may show the value of the business of the agency they gave on condition of such promise.

*Appeal from District Court, Silver Bow County; William Clancy, Judge.*

ACTION by John McCormick against J. A. Johnson and J. C. McCarthy, partners doing business under the firm name of Johnson & McCarthy, and M. C. Harris. From a judgment for defendants, and from an order denying a new trial, plaintiff appeals. Affirmed.

Mr. John J. McHatton, and Mr. George F. Shelton, for Appellant.

*Mr. John A. Luce, and Mr. S. C. Herren, for Respondents, Johnson & McCarthy.*

MR. JUSTICE HOLLOWAY delivered the opinion of the court.

This action was brought by John McCormick against J. A. Johnson and J. C. McCarthy, partners doing business under the firm name of Johnson & McCarthy, and M. C. Harris.

Stripped of barren verbiage, the pleadings disclose the following: That the plaintiff and the defendant Harris were partners doing business in Butte under the firm name of Harris & McCormick, hereafter referred to as the "firm"; that between November 25, 1895, and February 1, 1896, this firm sold for the defendants Johnson & McCarthy, at their special instance and request, 23,477,820 pounds of coal, for which they were to receive a commission of ten cents per ton, amounting to \$1,173.90, no part of which had ever been paid. Plaintiff further alleges that his copartner, Harris, refused to join him in this action as plaintiff, and therefore he is made a defendant. It is further alleged that the defendants are colluding and conniving together to defraud the plaintiff out of his interest in the amount due the firm; that Harris is insolvent, and, if permitted to secure possession of plaintiff's share, plaintiff will be unable to recover it. It is further alleged that the affairs of the copartnership of Harris & McCormick are fully wound up and settled, and there are no other assets of said firm except the account against Johnson & McCarthy, of which the plaintiff is entitled to one-half and Harris to the remainder. The prayer is for judgment against Johnson & McCarthy for \$1,173.90 and for an injunction restraining the defendants from making any disposition of such sum pending the trial and final disposition of the controversy.

To this complaint the defendants Johnson and McCarthy filed a separate answer, admitting the existence of the copartnership of plaintiff and Harris, and also the partnership of John-

son & McCarthy; admitting also that the firm had sold the amount of coal mentioned in the complaint, and was to receive therefor as commission ten cents per ton, but further alleging that such coal was delivered under a special contract as follows: That prior to November 25, 1895, the Harris & McCormick Company (hereafter referred to as the "company") was a corporation doing a commission business in Butte; that nearly all the capital stock of such company was owned by the plaintiff and defendant Harris; that such company was the agent of Johnson & McCarthy for selling coal in Butte, and on November 25, 1895, was indebted to Johnson & McCarthy in the sum of \$1,215; that on this last-mentioned date such company made an assignment for the benefit of its creditors, and made Johnson & McCarthy second preferred creditors for the sum of \$1,550; that immediately thereafter the partnership of Harris & McCormick was formed, and such firm made application to Johnson & McCarthy for the agency at Butte to sell coal for them; that thereupon an agreement was entered into, by the terms of which the firm was constituted the agent at Butte for Johnson & McCarthy in selling coal, for which such firm should receive as commission ten cents per ton; that such agency was created in consideration that the firm should assume and pay the indebtedness of the company to Johnson & McCarthy, and that all receipts from the sale of coal made by the firm should be turned over to Johnson & McCarthy, and that every month thereafter credit on the former account of the company should be made of the commissions earned the previous month by the firm; that such agreement was carried out until February 1, 1896, when the full amount of \$1,173. 90 so earned by the firm had been applied to the liquidation of the former indebtedness of the company, and the balance of said indebtedness was thereupon paid by Harris and the agency of the firm for Johnson & McCarthy terminated.

The answer denies any collusion or connivance on the part of Johnson & McCarthy and Harris, or any intent to defraud McCormick. The defendant Harris also filed a separate answer



of like import as the answer of Johnson & McCarthy, and also denied that he had ever refused to join the plaintiff in bringing this action. The reply denies the existence of the special contract mentioned in the answers.

The cause was tried to the court without a jury. The court found the issues for the defendants, and entered a judgment in their favor for costs, from which judgment and an order refusing him a new trial the plaintiff appealed.

The specifications relied upon are insufficiency of the evidence to support the findings, decision and order of the court, and errors in law occurring at the trial and excepted to by plaintiff. Numerous specifications are made of the insufficiency of the evidence to support the decision of the court, but they may be considered together.

The answer of the defendants Johnson & McCarthy amounts to a confession and avoidance. There is no question but what the full amount of \$1,173.90 was earned by the firm and is due to it, unless the same has been paid; and there is no claim whatever that any part of it has been paid, except in the manner set forth in the answers. If the contract mentioned by the defendants was actually made and executed as alleged in the answers, then the firm was fully paid prior to the commencement of this action. If such contract was not made, then plaintiff should have prevailed, assuming that he has the right to maintain this action, which question is not considered, but reserved.

It is earnestly contended by appellant that the special contract alleged in the answers, if ever entered into at all, was invalid under the statute of frauds (Subdivision 2, Section 2185, Civil Code), which provides: "The following contracts are invalid, unless the same, or some note or memorandum thereof, be in writing and subscribed by the party to be charged, or his agent:  
\* \* \* (2) A special promise to answer for the debt, default or miscarriage of another, except in the cases provided for in Section 3612 of this Code." The contention made is that the contract as alleged is clearly a special promise on the part of the firm of Harris & McCormick to answer for the antecedent

debt of the Harris & McCormick Company, a corporation, and, as the evidence shows that such contract was not in writing, therefore there was no evidence to support any legal defense which defendants made. However, Subdivision 2 of Section 2185, above, is subject to the qualifications imposed by Section 3612 of the same Code. This latter section, among other things, provides: "A promise to answer for the obligation of another, in any of the following cases, is deemed an original obligation of the promisor, and need not be in writing: \* \* \* (3) Where the promise being for an antecedent obligation of another \* \* \* is made upon a consideration beneficial to the promisor, whether moving from either party to the antecedent obligation, or from another person."

While there is considerable conflict in the authorities respecting the proper construction to be given to statutes of this character, the decided weight of authority seems to uphold this rule, namely: When the original debt was antecedently contracted and subsists, the promise to pay it is original if founded upon a new consideration moving to the promisor, and beneficial to him, and such that the promisor thereby comes under an independent duty of payment, irrespective of the liability of the principal debtor. (Brown on Statute of Frauds, Sec. 214a; *White v. Rintoul*, 108 N. Y. 222, 15 N. E. 318.)

In *Emerson v. Slater*, 22 How. (U. S.) 28, 16 L. Ed. 360, the same rule, in effect, is thus stated: "Cases arise which also fall within the statute, where the collateral agreement is subsequent to the execution of the debt, and was not the inducement to it, on the ground that the subsisting liability was the foundation of the promise on the part of the defendant, without any other direct and separate consideration moving between the parties. But whenever the main purpose and object of the promisor is, not to answer for another, but to subserve some pecuniary or business purpose of his own, involving either a benefit to himself or damage to the other contracting party, his promise is not within the statute, although it may be in form a promise

to pay the debt of another, and although the performance of it may incidentally have the effect of extinguishing that liability." To the same effect are the following authorities: 2 Current Law, 109; *Pratt v. Fishwild*, 121 Iowa, 642, 96 N. W. 1089; *Lookout Mt. R. Co. v. Houston*, 85 Tenn. 224, 2 S. W. 36, and cases cited; *Gilmore v. Skookum Box Factory*, 20 Wash. 703, 56 Pac. 934; *Crawford v. Edison*, 45 Ohio St. 239, 13 N. E. 80; *Simpson v. Carr*, 25 Ky. Law Rep. 849, 76 S. W. 346; 1 Reed on Statute of Frauds, Sec. 73.

The question of novation is not involved. If the promisor is to receive some substantial benefit—a benefit which he did not enjoy before—for which his promise is exchanged, it is wholly immaterial whether the original debtor remains liable or not. (*Calkins v. Chandler*, 36 Mich. 320, 24 Am. Rep. 593, and the cases cited; *Gilmore v. Skookum Box Factory*, *supra*.) The rule has for its basis the new consideration, and the promise founded upon it creates a primary liability on the part of the promisor.

Applying these principles, then, to the facts of this case, we observe that, if the special contract pleaded in the answers was ever made at all, it had for its consideration the agency for Johnson & McCarthy at Butte to handle their coal in that market for them, conferred upon the firm; an agency which the testimony shows was worth to such firm about \$750 per month. In other words, if we accept the version of the contract as given by Johnson and Harris, it is apparent that the firm would not have been constituted the agent for Johnson & McCarthy unless that firm had assumed and agreed to pay the prior existing debt of the company; and their version further is that, as an inducement to Johnson & McCarthy to constitute the firm their agent, such firm agreed to assume and pay the debt of the company. We are of the opinion that, if the contract as pleaded in the answers was actually entered into, the promise to pay the prior debt of the company became an original obligation on the part of the firm, enforceable, though not in writing.

Was the contract pleaded in the answers actually entered into? J. A. Johnson, one member of the firm of Johnson & McCarthy, testified, in effect, that he was in Butte soon after the assignment was made by the company; that he saw both Harris and McCormick; that they solicited the agency in handling the coal for Johnson & McCarthy at Butte; that he told them that his firm would not take under the assignment, as he did not know whether there would be anything for them; that he further told them that the only condition upon which they could have the agency was that they became responsible for the debt of the company and allow Johnson & McCarthy to retain the commissions earned until the debt was paid; that they agreed to this, and carried out the agreement, and it was some months afterwards before there was any trouble about it. M. C. Harris, who was the copartner with plaintiff, testified to the same effect; and one Fitz Butler, who was bookkeeper for the company, assignee of that company, and also the bookkeeper for the firm, testified that McCormick told him that Mr. Johnson had said to him (McCormick) again and again that he wanted him to remember that the partnership was to assume the indebtedness of the corporation.

The plaintiff contradicted the evidence of these witnesses on behalf of the defendants, but offered no other evidence in dispute of their testimony except some letters which he had received from McCarthy, one of the defendants—one making inquiry as to what had been done under the assignment, and in the others agreeing to pay McCormick what he claimed of the commissions if McCormick would secure an order therefor from Harris. These letters are explained by McCarthy by saying that the only knowledge he had of the terms of the agreement was what he received from Johnson, his copartner; that he wrote the letters above referred to without consulting Johnson; that he charged the partnership with the debt of the corporation, and every month thereafter credited the partnership with the commissions which they had earned the previous month; that they were willing to pay McCormick the amount which he claimed

out of the commission if he secured an order from Harris for them to do so.

In the light of this testimony the court found the issues for the defendants. In other words, the court found that the special contract as pleaded had been entered into and had been fully carried out. We are of the opinion that the evidence is abundant to sustain the finding of the court in this regard.

Was there evidence sufficient to show that the company owed Johnson & McCarthy at least \$1,173.90? The books of the company, kept by Butler, showed an indebtedness on October 31st of \$1,458.74, and on November 30th, \$1,147.76. The witness Harris testified that at the time the assignment was made the corporation owed Johnson & McCarthy about \$1,200. McCarthy testified, in effect, that the commissions earned by the firm, which the pleadings admit amounted to \$1,173.90, did not entirely liquidate the prior debt of the company; and that a small balance was left on February 1, 1896, which was subsequently paid by Harris.

The exact amount of such indebtedness was immaterial so long as it equaled or exceeded the amount of the commissions earned by the firm; and the general finding of the court in favor of the defendants amounted to a specific finding that such indebtedness was at least \$1,173.90, and in support of this finding the evidence appears ample.

It is contended that the evidence is insufficient to show that Johnson & McCarthy did not receive any benefit from the assignment of the company. With reference to this the witness Harris testified: "Johnson came over immediately after the assignment. \* \* \* He said he would not have anything to do with the assignment, and, if we wanted the agency, we would have to let him keep the commissions until the old debt was paid." The defendant Johnson testified that his firm received nothing whatever from the assignee of the company. Butler, the assignee, testified with reference to this matter as follows:

"Q. Can you testify at this time whether or not the firm of Johnson & McCarthy ever received anything from you as as-

signee of the old company? A. No, sir; they did not. I know they did not." In the absence of any evidence to contradict these statements, it would seem that the court had abundance of evidence to satisfy it that nothing whatever was paid by the assignee to the defendants Johnson & McCarthy.

When the plaintiff was testifying in his own behalf he was asked this question: "Q. Did you ever authorize Mr. Harris to make an agreement for your partnership to assume the indebtedness of the corporation?" An objection to this question was interposed on the ground that it was immaterial and incompetent, which objection was sustained, and the plaintiff excepted. The theory of the defendants was that the agreement by which the firm had assumed and agreed to pay the prior debt of the company, was made in Butte between Johnson, acting for the firm of Johnson & McCarthy on the one part, and Harris and McCormick. Both Johnson and Harris testified that McCormick was present at the time and participated in making the agreement. Butler testified that McCormick afterwards told him the terms of the contract under which they secured the agency for Johnson & McCarthy. These terms, as testified to by these witnesses, are the terms set forth in the answers. There is no claim on the part of the defendants that the contract was made with Harris alone, representing the partnership of Harris & McCormick, and therefore it was entirely immaterial, upon this theory of the case, whether McCormick had ever authorized Mr. Harris to enter into such an agreement or not. Either McCormick participated in making the agreement or the agreement was never made.

On cross-examination the witness McCormick was asked: "Q. At the time that you were in the coal business, right after the failure of the corporation, how did your account stand with Johnson & McCarthy?" An objection was interposed to this question, the objection was overruled, and error is assigned. In view of the fact that the witness answered, "I don't know," it is apparent that, if the court committed error in permitting the question to be answered, the error is without prejudice.

While the defendant Johnson was on the witness stand he was asked by his counsel this question: "Q. What, if anything, did your firm ever receive from the assignee of the corporation known as Harris & McCormick Company, which made its assignment to F. H. Butler, as assignee, on or about the 25th of November, 1895?" to which counsel for plaintiff objected on the ground that it was immaterial, irrelevant and incompetent under the pleadings of this case. The objection was overruled, and exception noted. The witness answered, "Nothing." The pleadings in this case show that Johnson & McCarthy had been made a second preferred creditor of the company. The plaintiff himself admits that this preference was made without the knowledge of Johnson and McCarthy, or either of them. Since the defendants Johnson and McCarthy are claiming in their answer that they had fully paid all commissions earned by the firm under the special contract claimed by them to have been made for the assumption and payment of the debt of the company, and that such contract had been carried out according to its terms as understood by them, they deemed it necessary to show that no part of that indebtedness had been liquidated otherwise. Certainly no injury could be done to the plaintiff by reason of this character of testimony; for, after all, without any reference to the assignment, the plaintiff was entitled to recover unless he had been fully paid, and the only pretense made that he had been paid was that the payment was made under the special contract pleaded in the answers.

While the defendant Harris was on the witness stand testifying with reference to the agency which he and his partner had for handling coal for Johnson & McCarthy, he was asked, with reference to that business, this question: "Q. About how much would that business average?" To this an objection was interposed that it was immaterial and incompetent. The objection was overruled, and an exception noted. The witness answered, "About \$750 per month." As heretofore said, the only defense made to the plaintiff's cause of action was that the plaintiff and his copartner, Harris, had agreed to assume and pay the debt

of the company. It was, therefore, necessary, in presenting this theory of the case for the defendants, to show that the contract which they entered into with the firm was not within the inhibition of the statute of frauds, but, on the contrary, that they parted with value, and that such firm acquired a valuable concession in being constituted the agent for Johnson & McCarthy for handling their coal in the city of Butte, and therefore the contract comes within the purview of Subdivision 3 of Section 3612, above, and that it was, therefore, a valid contract, and need not be in writing. Upon this theory the evidence was properly admitted.

We are of the opinion that the evidence is amply sufficient to justify the finding and decision of the court, and that the record discloses no prejudicial error. The judgment and order are affirmed.

*Affirmed.*

MR. JUSTICE MILBURN CONCURS.

MR. CHIEF JUSTICE BRANTLY, not having heard the argument, takes no part in the foregoing decision.

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NICHOLSON ET AL., RESPONDENTS, v. METCALF,  
APPELLANT.

(No. 1,942.)

(Submitted September 28, 1904. Decided November 10, 1904.)

*New Trial—Newly Discovered Evidence—Diligence—Abuse of  
Discretion—Appeal.*

Affidavit in support of a motion for a new trial on the ground of newly discovered evidence, examined and held insufficient to show diligence required by Code of Civil Procedure, Section 1171.



*Appeal from District Court, Silver Bow County; E. W. Harney, Judge.*

ACTION by D. D. Nicholson and another against George Metcalf, as administrator of the estate of Peter B. Dunn, deceased. There was judgment for defendant, and from an order granting a motion for a new trial he appeals. Reversed.

*Mr. E. F. Fleming, and Mr. W. E. Moore, for Appellant.*

*Mr. M. D. Kelly, for Respondents.*

MR. COMMISSIONER CLAYBERG prepared the following opinion for the court:

This is an appeal by Metcalf from an order granting a new trial. The only ground of the motion for a new trial was newly discovered evidence. The only affidavit filed showing that evidence was newly discovered is that of plaintiffs. This affidavit, in so far as the discovery of the evidence and the showing of diligence in that regard is concerned, is as follows: "That subsequent to the trial of said cause, to-wit, on the 12th day of December, A. D. 1902, I have discovered evidence which will establish the fact that myself and my co-plaintiff in said action," etc. Then follows a statement of the evidence which has been discovered. The affidavit then continues: "I did not know of the existence of said evidence at the time of the trial, and could not, by the use of reasonable diligence, have discovered or produced the same upon the former trial. The name of the witness by which I can establish the facts herein set forth is E. A. Briggs, now residing at Centerville, in Silver Bow county, Montana; that I did not for eighteen years prior to the 12th day of December, A. D. 1902, know the whereabouts of said Briggs." The affidavit of Briggs also appears in the record, supporting the affidavit of plaintiffs as to the facts to which he would testify, and stating that he was present and heard the conversation upon which plaintiffs' cause of action was based.

The statute concerning new trials provides as follows: "The former verdict or other decision may be vacated and a new trial granted on the application of the party aggrieved for any of the following causes materially affecting the substantial rights of such party: \* \* \* (4) Newly discovered evidence material for the party making the application which he could not with reasonable diligence have discovered and produced at the trial." (Section 1171, Code of Civil Procedure.)

We are of the opinion that the affidavit does not contain a sufficient showing of diligence, as contemplated by the statute, to warrant the order appealed from. (*Rand v. Kipp*, 27 Mont. 138, 69 Pac. 714; *Gregg v. Kommers*, 22 Mont. 511, 57 Pac. 92; *Caruthers v. Pemberton*, 1 Mont. 111; *Butler v. Vassault*, 40 Cal. 74; *Hendy v. Desmond*, 62 Cal. 260; *Bagnall v. Roach*, 76 Cal. 106, 18 Pac. 137; *Barton v. Laws*, 4 Colo. App. 212, 35 Pac. 284; *State v. Power*, 24 Wash. 34, 63 Pac. 1112, 63 L. R. A. 902; *Bradley v. Norris*, 67 Minn. 48, 69 N. W. 624; 1 Spelling on New Trial and Appeal, Secs. 209-218.)

Under these authorities it was incumbent upon plaintiffs to show that they had been guilty of no laches, and that failure to produce the evidence on the trial could not be imputable to lack of diligence on their part. They must make strict proof of diligence, and a general averment of its existence is insufficient. Whether reasonable diligence has been used is a question to be determined by the court upon the affidavits presented, and therefore these affidavits should state with particularity what acts were performed. They should show what diligence was used, how the new evidence was discovered, why it was not discovered before the trial, and such other facts as make it clear that the failure to produce the evidence was not their own fault, or because of want of diligence on their part. So far as the evidence presented in this case is concerned, the first search for evidence may have been made after the cause has been tried. If Briggs was present at the conversation, plaintiffs must have known it. Perhaps this fact escaped their memory at the time of the trial,

but mere forgetfulness is no excuse. (*Hendy v. Desmond*, 62 Cal. 260.)

The mere allegation that for eighteen years plaintiffs did not know the whereabouts of Briggs is insufficient. If plaintiffs knew that Briggs could testify in their behalf, they should have shown that they had exhausted the methods provided by law for obtaining the attendance of witnesses. If they did not know that Briggs could so testify, it is immaterial that they did not know his whereabouts.

While it is true that the granting or refusing of a motion for a new trial is largely in the discretion of the trial court, and its action will not be interfered with on appeal unless there is abuse of such discretion, the affidavits being defective in the showing of diligence, we are satisfied that the court below had no authority to grant the order, and therefore abused its discretion.

We therefore advise that the order appealed from be reversed, and the cause remanded.

PER CURIAM.—For the reasons stated in the foregoing opinion, the order is reversed and the cause remanded.

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BROPHY, RESPONDENT, v. IDAHO PRODUCE & PROVISION COMPANY, APPELLANT.

(No. 1,947.)

(Submitted September 28, 1904. Decided November 10, 1904.)

*Contracts—Acceptance—Variance from Proposal—Statute of Frauds—Burden of Proof—Practice—Nonsuit—Submission on Plaintiff's Testimony.*

1. Where the value of property involved in a sale is sufficient to bring the contract of sale within the provisions of Civil Code, Sections 2185, 2340, and Code of Civil Procedure, Section 3276, the burden is on plaintiff, in an action

for breach of the contract, to establish by a preponderance of evidence that a valid contract under the statutes was entered into between the parties, together with a breach of such contract, and the consequent damages.

2. An order for "choice" potatoes is not an acceptance of a proposal to sell "nice white potatoes (Peerless stock)."
3. Where a proposal offered for sale ten cars of "nice white potatoes (Peerless stock)," an order of purchase requiring the seller to select the stock and send no small ones constituted a variation from the proposal, and was not an acceptance.
4. A proposal to sell ten car loads of potatoes is not accepted by an order for potatoes which requires the cars to average 30,000 pounds, but such condition constitutes a variation from the proposal.
5. A proposal to sell ten cars of potatoes for winter use is not accepted by an order of eight cars for winter storage.
6. In order to constitute a binding contract, the terms of payment, as well as the other elements of the contract, must be agreed upon.
7. Defendant, if satisfied that the evidence introduced by plaintiff is not sufficient to warrant a recovery, may move for nonsuit, which raises a question of law, admitting the truth of the evidence but questioning its sufficiency, or, proceeding upon the theory that the jury will not believe plaintiff's testimony, may have the case submitted to the jury upon plaintiff's evidence alone, in which case the question submitted is one of fact, with the burden of proof on plaintiff to establish by a preponderance of the evidence the allegations of his complaint.

*Appeal from District Court, Silver Bow County; E. W. Harney, Judge.*

ACTION by P. J. Brophy, doing business as P. J. Brophy & Co., against the Idaho Produce & Provision Company. From a judgment for plaintiff and from an order denying a new trial, defendant appeals. Reversed.

*Mr. J. L. Wines, for Appellant.*

The proposal of defendant was not accepted by plaintiff, and the letter from plaintiff, dated September 14, 1901, was a rejection of defendant's offer. (Clark on Contracts, Hornbook Series, par. 19, pp. 36, 37, 38, 39; Clark on Contracts, par. 27, pp. 52, 53, 54; Brown on the Statute of Frauds, Sec. 371; 21 Am. and Eng. Ency., pp. 455-456 and notes; 3 Am. and Eng. Ency., pp. 852-853 and notes; *Breckenridge v. Crocker*, 78 Cal. 529; *Meux v. Hogue*, 91 Cal. 442; *Wristen v. Bowles*, 82 Cal. 84; *McCotter v. The Mayor*, 37 N. Y. 325; *Potts v. Whitehead*, 23 N. J. Eq. 512; *Bruce v. Pearson*, 3 Johnson Repts. 534;

*Baker v. Holt*, 14 N. W. 8; *Clay v. Rickerts*, 23 N. W. 755; *Weaver v. Burr*, 8 S. E. 743; *Eggleston v. Wagner*, 46 Mich. 610; *Johnson v. Stevenson*, 26 Mich. 62; *Martin v. N. W. Fuel Co.*, 22 Fed. Rep. 596; *Crabtree v. St. Paul Opera House Co.*, 39 Fed. 746; *Ortman v. Weaver*, 11 Fed. 358; *First Nat'l Bank v. Hall*, 101 U. S. 43; *Utley v. Donelson*, 94 U. S. 29; *Minn. & St. Louis Ry. Co. v. Columbia Rolling Mill Co.*, 119 U. S. 149; *Eliason v. Henshaw*, 4 Wheaton, 225; *Carr v. Dural*, 14 Peters, 77.)

Even if it be conceded that the letter of plaintiff to defendant, dated September 18th, was a sufficient acceptance under the authorities (which we do not admit), the same was not within a reasonable time, there being both mail and telegraphic communication between the points where the parties did business. (*Trouistine v. Sellers*, 11 Pac. Rep. 441; *Minn. Poi Company v. Collier Whitelead Company*, 17 Fed. Cases, p. 447, No. 9,635.)

*Messrs. McBride & McBride*, for Respondent.

The judgment appealed from was entered in this case upon the pleadings and the testimony on behalf of plaintiff and respondent Brophy—the defendant corporation declined to offer any testimony whatever in the case, and submitted the action to the court upon the testimony of plaintiff. The action of defendant and appellant in declining to offer any testimony was, in effect, a motion for nonsuit. “When all the evidence offered by the plaintiff has been given, and a motion for a nonsuit is interposed, a question of law is presented whether the evidence before the jury tends to prove all the facts involved in the right of action and put in issue by the pleadings—all that the evidence, in any degree, tends to prove, must be received as fully proved; every fact that the evidence, and all reasonable inferences from it, conduces to establish, must be taken as fully established.” (*Ellis v. Ohio L. Ins. Co.*, 4 Ohio St. 645.)

The motion for a nonsuit is deemed to admit the truth of all the evidence introduced by the plaintiff; accordingly every fact

which the evidence tends to prove, and all reasonable deductions therefrom must be conceded to have been fully established for the purpose of deciding the motion, and all conflicting inferences or presumptions arising from the evidence must be resolved in favor of the plaintiff. (6th Ency. of Practice, pp. 942 and 943, and cases cited; *Soyer v. Great Falls Water Co.*, 15 Mont. 1; *State v. Benton*, 13 Mont. 306.)

On motion for a nonsuit, the court is bound to give the evidence the most favorable construction for the plaintiff which it will possibly bear. (*Inhoff v. Chicago Railroad Co.*, 22 Wis. 684; *Jensen v. Barbour*, 15 Mont. 582; *Holter Lumber Co. v. Firemen's Ins. Co.*, 18 Mont. 282; *State ex rel. Harmon v. Conrow*, 19 Mont. 104; *Cummings v. H. & L. S. R. Co.*, 26 Mont. 434.)

This testimony not only tends to show, but does show conclusively, that not only was Mr. Brophy satisfied to accept the terms made by the Idaho Produce & Provision Company, but, as a matter of fact, did accept the same, and honored the draft made upon him, the honoring of which draft was made by defendant the only condition asked by it as to further shipments of potatoes under the contract conceded by it to have been entered into. Defendant itself has construed the correspondence in evidence and by its pleadings concedes that it understood its effect to be a contract for the sale of ten carloads of potatoes at sixty cents per hundred weight, and, under such circumstances, the court will not disturb the conclusion reached by the parties themselves. (*King v. Dahl*, 84 N. W. 737; *Fairmount Glass Works v. Grunden-Martin Woodenware Co.*, 51 S. W. 196.)

MR. COMMISSIONER CLAYBERG prepared the following opinion for the court:

This is an appeal by defendant from a judgment in favor of plaintiff and from an order overruling a motion for a new trial.

P. J. Brophy was doing business under the name of P. J. Brophy & Co. The defendant was a corporation. The contro-

versy arose over an alleged contract for the sale and delivery of ten carloads of potatoes, the plaintiff asserting such sale and a non-delivery. The defendant admits making an offer of sale to plaintiff, and claims that the same was not accepted. The value of the property involved in the alleged sale is sufficient to bring the contract under the provisions of Sections 2185 and 2340 of the Civil Code, and 3276 of the Code of Civil Procedure. The burden, therefore, was upon plaintiff to establish by a preponderance of evidence that a valid contract under the above statutes was entered into between the parties, its breach, and his damages. There is no dispute but that defendant failed to perform the contract, if one was made; neither is the amount of damages sought to be established by plaintiff contested. The only question, therefore, for our consideration is whether a valid contract was established by plaintiff's proofs. The defendant offered no testimony, but relied upon that offered by plaintiff as not being sufficient to establish a valid contract; so that there is no conflict in the testimony, and the only question is, did the testimony offered by plaintiff, as a matter of law, establish a valid contract for the sale of ten carloads of potatoes?

Section 2185 of the Civil Code provides: "The following contracts are invalid, unless the same, or some note or memorandum thereof, be in writing and subscribed by the party to be charged, or his agent: \* \* \* (4) An agreement for the sale of goods, chattels or things in action, at a price not less than two hundred dollars, unless the buyer accept or receive part of such goods, chattels or the evidences, or some of them, of such things in action, or pay at the time some part of the purchase money \* \* \*

Section 2340 of the Civil Code provides: "No sale of personal property, or agreement to buy or sell it for a price of two hundred dollars or more, is valid, unless: (1) The agreement or some note or memorandum thereof be in writing, and subscribed by the party to be charged, or by his agent; or, (2) the buyer accepts and receives part of the thing sold, or when it consists of a thing in action, part of the evidences thereof, or some

of them; or, (3) the buyer at the time of sale, pays a part of the price."

Section 3276 of the Code of Civil Procedure provides: "In the following cases the agreement is invalid, unless the same or some note or memorandum thereof be in writing, and subscribed by the party charged, or by his agent; evidence, therefore, of the agreement cannot be received without the writing or secondary evidence of its contents; \* \* \* (4) An agreement for the sale of goods, chattels or things in action at a price not less than two hundred dollars, unless the buyer accept and receive part of such goods and chattels, or the evidences, or some of them, of such things in action, or pay at the time some part of the purchase money. \* \* \*"

As above stated, the proof must, therefore, have shown an agreement which is covered by Subdivision 4 of Sections 2185 of the Civil Code and 3276 of the Code of Civil Procedure and by Section 2340 of the Civil Code. The evidence of the sale under Section 3276 of the Code of Civil Procedure must be in writing, or secondary evidence of such writings, and perhaps such oral testimony as is explanatory of ambiguities in the writings.

The alleged contract consists of the following correspondence between the parties: It seems that about September 6, 1901, appellant sent to respondent a trade circular (which is not in evidence), by which it announced the fact that it was prepared to furnish farm produce to purchasers. On September 10, 1901, respondent wrote the following letter to appellant: "Gents: Replying to your favor of the 6th inst., we will be pleased to have you quote us prices on potatoes for winter use, say from six to ten cars, shipments to be made within the next six weeks. Your very best efforts in this direction will be appreciated by, yours truly." By this letter respondent requested appellant to make him a proposition or offer to sell "from six to ten cars", of "potatoes for winter use," to be shipped "within the next six weeks." In reply to this letter appellant sent respondent the following under date of September 12th: "Your favor of the



10th inst. at hand and noted. We can furnish you ten cars of nice white potatoes (Peerless stock) at 60c. per hundred sacked, f. o. b. Rexburg. We also have some stock, but a little scabby, at 55c. per H. at this point. \* \* \* By construing this letter with that of respondent's of the 10th, above quoted, appellant offered to sell respondent "ten cars of nice white potatoes (Peerless stock) at 60c. per hundred, sacked, f. o. b. Rexburg," and "some stock, but a little scabby, at 55c. per H. at this point," which were to be for winter use, and shipped within six weeks from September 10th. This was the only offer appellant made. All that was required to make a valid contract between the parties was the acceptance by respondent of this offer within a reasonable time.

Judge Graves, of the Supreme Court of Michigan, in the case of *Eggleston v. Wagner*, 46 Mich. 610, 10 N. W. 37, states the rule as to the acceptance of an offer in the following clear and concise language: "In order to convert a proposal into a promise, the constituents of the acceptance tendered must comply with and conform to the conditions and exigencies of the proposal. The acceptance must be of that which is proposed, and nothing else, and must be absolute and unconditional. Whatever the proposal requires to fulfill and effectuate, acceptance must be accomplished, and the acceptance must include and carry with it whatever undertaking, right or interest the proposal calls for, and there must be an entire agreement between the proposal and acceptance in regard to the subject-matter and extent of interest to be contracted. If the parties do not refer to the same things in the same sense, the transaction is simply one of proposals and counter proposals." This language is quoted with approval by Mr. Mechem in his work on Sales (Section 288), and numerous other cases are cited in its support.

In *Potts v. Whitehead*, 23 N. J. Eq. 514, the court says: "An acceptance, to be good, must, of course, be such as to conclude an agreement or contract between the parties. And to do this it must in every respect meet and correspond with the offer, neither falling within nor going beyond the terms proposed, but

exactly meeting them at all points, and closing with them just as they stand."

The Supreme Court of the United States, in the case of *Minneapolis, etc. Ry. v. Columbus R'g Mill*, 119 U. S. 149, 7 Sup. Ct. 168, 30 L. Ed. 376, says: "As no contract is complete without the mutual assent of the parties, an offer to sell imposes no obligation until it is accepted according to its terms. So long as the offer has been neither accepted nor rejected, the negotiation remains open, and imposes no obligation upon either party; the one may decline to accept, or the other may withdraw his offer; and either rejection or withdrawal leaves the matter as if no offer had ever been made. A proposal to accept or an acceptance upon terms varying from those offered is a rejection of the offer, and puts an end to the negotiation, unless the party who made the original offer renews it, or assents to the modification suggested. The other party, having once rejected the offer, cannot afterwards revive it by tendering an acceptance of it." In fact, the cases holding this doctrine are legion, and no occasion arises for incumbering this opinion with further citations.

Now, remembering that the proposal was to sell "ten cars of nice white potatoes (Peerless stock) at 60c. per hundred, sacked, f. o. b. Rexburg," or "some stock, but a little scabby, at 55c. per H. at this point," which potatoes were to be for winter use, and shipped within six weeks after September 10th, let us see what action the respondent took upon such proposal, and whether or not he accepted the same within the rules above laid down. Respondent replied to the letter of September 12th, above quoted, on the 14th of September, in the following language: "We have your favor of the 12th inst. and would be glad to have you ship us immediately, as we are entirely out of stock now, one carload of potatoes. Will instruct you as to the balance later, but your expedition in this matter will be highly appreciated." Nothing is said herein as to whether respondent accepts either of the propositions stated in appellant's letter of the 12th, but orders one carload of potatoes. He does not say whether such car shall be of the nice white potatoes (Peerless stock), or of the

stock which appellant said was a little scabby. Again, on September 18th respondent wrote appellant as follows: "Replying to your favor of the 12th and 16th, with reference to the one car of potatoes ordered by us on the 14th, we wish you would give us the quickest service possible, as we are at this time almost entirely out, and referring to your offer of the 12th on ten cars choice potatoes, there is no especial rush about this except that we want to get them in after they have fully matured and before any risk of freezing must be taken into account. That is to say, during the month of October will be all sufficient, commencing from the 12th to the 15th, and shipping a car every two or three days until the amount will have been delivered. You of course will select the stock for us, and send no small ones. We expect the cars to average 30,000. By the way, if you have shipped the first car by this time we can use another on or about the 1st of October, and the eight for winter storage may then come along as above indicated, commencing about the 12th. We feel that they will be fully matured by that time, but if our judgment in the matter is wrong we will be glad to abide by yours."

Do these two letters, or either of them, constitute an acceptance of the proposal made by the appellant, within the rule above announced? We do not think they do. In the first place, the offer was ten cars of "nice white potatoes (Peerless stock)." The letter of the 18th refers to an offer of ten cars of "choice potatoes." Whether or not "nice potatoes (Peerless stock)" and "choice potatoes" are of the same grade and price the evidence does not disclose, and we are therefore left in doubt. The word "choice" is defined as "meriting preference; having special excellence; select; precious." (Standard Dictionary.) The word "nice" is defined: "(1) Characterized by discrimination and judgment; acute; discerning. \* \* \* (4) Exactly fitted or adjusted; accurate; apt. \* \* \* (5) Delicately constructed; hence, easily disarranged or injured; fragile; tender. (6) \* \* \* Agreeable or pleasant in any way. \* \* \* Specifically: pleasing to the senses." (Standard Dictionary.)

We are of the opinion that when the appellant proposed to sell "nice" potatoes (Peerless stock), and the respondent expected "choice" potatoes, that it was not an acceptance of the proposal.

But again, in the letter of the 18th respondent says, "You of course will select the stock for us and send us no small ones." It will be noticed that nothing of this kind is stated in the offer—simply "ten cars of nice white potatoes (Peerless stock)." By the proposal it was undoubtedly intended to offer to defendant ten cars of nice potatoes (Peerless stock), as they run from the digging of the same; not that there should be no small ones among them. The small potatoes may be as nice as large ones, but not as choice. We are of the opinion that this was a variation from the proposal.

Again, respondent says in the letter of the 18th, "We expect the cars to average 30,000." Nothing is said in the proposal about the average weight of the cars. The proposal was to send ten carloads of potatoes. The number of pounds of potatoes in each car, therefore, would be such as are usually loaded in a car for transportation, and would depend somewhat on the size of the cars, and the rules of the railroad company shipping the potatoes as to the weight which might be put in each car. We are of the opinion that this also was a variation from the proposal.

But again, the proposal was for ten carloads of potatoes. By respondent's letter of the 12th of September he says: "We would be glad to have you ship us immediately as we are entirely out of stock now one carload of potatoes. Will instruct you as to the balance later, but your expedition in this matter will be highly appreciated." In the letter of September 18th respondent says: "By the way, if you have shipped the first car by this time we can use another one shipped on or about the 1st of October, and the eight for winter storage may then come along as above indicated, commencing about the 12th."

We find in respondent's testimony disclosed in the record the following statements: "I have said that the one car of potatoes which I paid for at 90 cents per hundred has nothing to do with

the ten cars which I spoke of in my letter of September 14th. I bought that car as a separate proposition. The balance which I referred to in that letter was the balance of the ten cars which defendant had quoted. It referred to the balance of ten cars agreed to be shipped, taking one car out. There was one car shipped to me by defendant. That car was quoted me by telegram. There is a letter which has not been offered in evidence, which refers to my order for one separate car. That letter has not been offered. It has been overlooked. It has nothing to do with the ten carloads sued for. The car which was shipped me was furnished to me at the price of 95 cents per hundred. I refused the offer at first, and then found myself obliged to order it shipped. This car was shipped on the 21st of September, and was billed at 95 cents per hundred. That car has nothing to do with the ten cars of potatoes mentioned in the letter of September 18th." Yet we find in the letter of September 18th that respondent seemed to include this car and another ordered to be shipped about the 1st of October in the ten cars claimed by him to have been bought of the appellant, for he says, "By the way, if you have shipped the first car by this time we can use another one shipped on or about the 1st of October, and the eight for winter storage may then come along as above indicated." It must be remembered that the request for proposal was for potatoes for winter use, and that the appellant proposed to sell ten cars of such potatoes. It is admitted by respondent that one car was paid for at either 90 or 95 cents per hundred, when the contract was for 60 cents per hundred, and that this car, together with one ordered to be shipped about October 1st, were for present use, and only eight cars were wanted for winter storage. The proposal to sell ten cars of potatoes for winter use and the acceptance of eight cars for winter storage are not consistent one with the other. The record further discloses that on the 15th day of October appellant wrote to respondent as follows: "Potatoes are now selling at this point at 75 cents per hundred. Have no doubt but that they will be cheaper later on. Will send you prices on car of mixed vegetables later." Appellant had

already shipped one car of potatoes either at 90 or 95 cents, and by this letter gives the prevailing price at his place of business to be 75 cents per hundred. In reply to this letter respondent wrote as follows on the 17th day of October: "We have your favor of the 15th inst. and replying thereto we must ask your attention to your letter of September 12th wherein you advise us that you can furnish us ten cars of nice white potatoes, Peerless stock, at 60c. per hundred, sacked, f. o. b. Rexburg. We accepted this offer immediately upon its presentation to us and now we must advise you that we want the potatoes and as this is the best season in which to ship them we want them shipped as quickly as possible according to our instructions on the point. They can be shipped now with much less risk than later when weather conditions will be less reliable. We do not want to take the risk of waiting for the market to decline to suit your figure while the delay will probably drive the shipment so far into the winter that the danger from freezing would more than counterbalance the gain by you from the declining market. So therefore we expect you to commence shipping the potatoes as soon as possible at the price at which you sold them to us. We trust you will advise us by the 20th inst. that you have commenced shipping, as otherwise we will be obliged to purchase them for your account." On the 19th of October, 1901, appellant replied to this letter as follows: "In reply to yours of the 17th inst. will say: We understand you want thirty days time on potatoes. Now we are paying cash for our potatoes and our terms with our customers are strictly cash, upon reasonable time for inspection, and we expect a remittance from you before we ship any more potatoes, and to that effect we have drawn sight draft on you to-day." In reply to this letter respondent wrote as follows: "We have your favor of the 19th inst. wherein you observe that you understand that we want thirty days time on potatoes. Your understanding in this matter is generally correct, in this, that thirty days time on potatoes, butter, eggs, poultry and produce of all description is general; but you advise us that your terms with your customers are strictly cash, and therefore

you want cash after the lapse of a reasonable time for inspection of shipment. This is of course quite satisfactory to us. We realize that your contract to furnish us with ten cars of potatoes would involve the investment of quite a little money, and on this account it will be a pleasure to us to remit for each car as soon as it has arrived and is inspected. What we want you to do, however, is to ship the potatoes. You volunteer to deliver ten cars at 60c. and now when we want delivery made, you seem to be a little slow about it. We wired you yesterday on receipt of your letter as follows: 'Will you commence shipping according to yours of September 12th, if we honor draft. Your terms, reasonable time for inspection, acceptable to us. Answer,' which we now confirm, and awaiting," etc., "we remain." It appears from the testimony of respondent that the draft mentioned in this correspondence was a draft made by appellant upon respondent for the first carload of potatoes ordered by respondent's letter of the 14th, and, as respondent says, had nothing to do with the ten cars of potatoes under the alleged contract, but was an extra car, ordered separately. In reply to this telegram and letter the appellant telegraphed respondent on October 21st, "Draft must be honored before further shipment." In reply to this respondent telegraphed: "Draft honored. We expect you to ship potatoes now as per your proposition of September 12th." In regard to this one car of potatoes ordered by letter September 14th the respondent further says: "I have personal knowledge of the draft referred to in this telegram of October 21, 1901, from defendant. It is a sight draft that defendant had made upon me for the carload of potatoes shipped to me at 90c. per hundred from the defendant. This carload of potatoes was not such potatoes as would be required for winter storage."

It is apparent from the record that several communications passed between the parties which were not offered in evidence, and are therefore not in the record. It may be that such communications would have explained a great many apparent inconsistencies in the letters and telegrams in the record, but, not

being in the record, we must construe the letters and telegrams as they appear. It appears, judging from the letters and telegrams in the record, that on September 14th respondent ordered one car of potatoes for immediate use. On September 18th he ordered another car, to be shipped about October 1st. The first car was shipped, and a sight draft made by appellant upon defendant for the potatoes included therein at 90 cents per hundred. Before the 19th of October respondent must have indicated in some manner that he desired thirty days' time on the potatoes, and the appellant stated that, "We expect a remittance from you before we ship any more potatoes, and to that effect have drawn sight draft on you to-day." It must be remembered that at that time there was no other order given by respondent to appellant for shipment of any potatoes except one car, which was ordered shipped about October 1st. This language in appellant's letter may have had reference to such car. If it had reference to the alleged contract to purchase all ten cars it would show that a valid contract had not been entered into for such purpose, because there seemed to be a disagreement between the parties as to the time of payment. Therefore the minds of parties had not met, and no contract existed. The terms of payment, as well as the other elements, must be agreed upon. (*Washington Ice Co. v. Webster*, 62 Me. 341, 16 Am. Rep. 462.)

It would have been very easy for respondent, upon receipt of appellant's letter of September 12th, to have written in reply, "We hereby accept the first proposal contained in your letter of September 12th." This would have covered the entire matter. This would have established a valid contract, under the statutes of this state, for the sale and delivery of ten cars of nice white potatoes (Peerless stock) at the price of 60 cents per hundred, f. o. b. Rexburg; but this acceptance was not given. Respondent, in his letters of the 14th and 18th of September, ordered two cars of potatoes for immediate use, which he says were not potatoes fit for winter storage, and by this letter of the 18th directed that the remaining eight cars for winter storage should



be shipped a little bit later. Instead of ten cars of nice potatoes (Peerless stock) for winter use, the respondent's proof shows an acceptance of only eight cars of choice potatoes. He insisted that there should be no small ones among them, and that each car should contain 30,000 pounds. The letters of the 14th and 18th were, in effect, a counter proposition, and not an acceptance, under the above authorities.

It will be noticed that in the brief of respondent the position is taken that, the defendant in the court below declining to offer any testimony and submitting the action to the court upon the testimony of plaintiff, was, in effect, a motion for a nonsuit, and respondent urges that the law has been declared by this and other courts that a motion for nonsuit is deemed to admit the truth of all the evidence introduced by plaintiff, and that every fact which the evidence tends to prove and all reasonable deductions therefrom must be conceded to have been established for the purpose of deciding the motion, and all conflicting inferences or presumptions arising from the evidence must be resolved in favor of plaintiff; that the court is bound to give the evidence the most favorable construction for plaintiff which it will possibly bear. In this position counsel for respondent have fallen into error. There is no rule of law which requires a defendant in the trial of a case in the court below to offer any evidence. If he is satisfied that the evidence introduced on behalf of plaintiff is not sufficient, upon any theory, to warrant a recovery, he may avail himself of that position by making a motion for nonsuit, which is, in effect, raising a point of law, and is tantamount to saying, "We admit the truth of all your evidence, but say as a matter of law that it is not sufficient"; or he may proceed upon another theory, and that is that the jury will not believe the testimony introduced by plaintiff, and submit the case for a finding of the jury upon the evidence the plaintiff has introduced. And upon this proposition it must be remembered that the burden is upon the plaintiff to establish by a preponderance of the evidence the allegations of his com-

plaint, and the question to be submitted is one of fact, and not of law.

We are clearly of the opinion that the record does not disclose an acceptance of appellant's proposition under the authorities above cited, and therefore that the plaintiff failed to show a valid contract. Therefore the case must be reversed, and we so advise.

PER CURIAM.—For the reasons stated in the foregoing opinion, the judgment and order are reversed, and the cause is remanded.

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STATE EX REL. REAGAN, RESPONDENT, v. HARRINGTON, APPELLANT.

(No. 1.967.)

(Submitted October 20, 1904. Decided November 14, 1904.)

*Justice of the Peace—Service of Justice's Summons—Jurisdiction.*

1. Code of Civil Procedure, Section 1689, as amended by Session Laws 1899, page 138, providing for the appointment of a special constable where no constable is elected or appointed to act in certain cases, did not affect Section 1510, authorizing a non-official person to serve a justice's summons.
2. The service of a justice's summons without a copy of the complaint gives no jurisdiction of defendant.
3. The return on a justice's summons is presumed to show all that was done by the person making the service.

*Appeal from District Court, Silver Bow County; William Clancy, Judge.*

WRIT OF REVIEW in the name of the state, on the relation of Maurice Reagan, against Timothy Harrington, justice of the peace. There was judgment for relator, and defendant appeals. Affirmed.

*Mr. Carl J. Smith*, for Appellant.

*Mr. Peter Breen*, and *Mr. J. J. Lynch*, for Respondent.

MR. JUSTICE HOLLOWAY delivered the opinion of the court.

On October 10, 1901, an action was commenced in the justice of the peace court of Silver Bow county by one O'Flynn against Maurice Reagan and Joe Long to recover the sum of \$70.90 and costs. A summons was issued, and placed in the hands of one F. E. Pilling, a nonofficial person, for service, who made his return thereupon by affidavit as follows: "State of Montana, county of Silver Bow—ss. F. E. Pilling, being first duly sworn, deposes and says: That he is and at the several times herein mentioned, was a male citizen of the United States, and a resident of the county of Silver Bow, state of Montana, and above the age of twenty-one years, and not a party of the above entitled action, and that he received the summons in the above entitled action on the 10th day of October, 1901, and personally served the same on the 10th day of October, 1901, by delivering a true copy thereof to Maurice Reagan and Joe Long, the defendants above named, in the county of Silver Bow, state of Montana. F. E. Pilling"—duly verified. This summons notified the defendants to appear on October 17th, at 9 a. m. On this last-named day the defendant failed to appear at the time mentioned in the summons, and at the expiration of one hour thereafter their default was entered, plaintiff made proof, and a judgment in accordance with the prayer of the complaint was entered.

On April 20, 1903, the defendant Reagan instituted *certiorari* proceedings in the district court to have the action of the justice of the peace court reviewed. Upon the return of the justice of the peace the district court entered judgment annulling the judgment of the justice's court. From that judgment this appeal is prosecuted.

The appellant is placed in the position of being compelled to show, if possible, the error of the district court by showing that

there was not any lack or excess of jurisdiction in the justice of the peace court in the case of O'Flynn v. Reagan and Long. This he seeks to do by attempting to show that the service of the summons was legally made, for the only attack made upon the proceedings in the justice court was upon the service of the summons. Respondent complains of that service on the ground that it was made by a nonofficial person, and contends that the effect of Section 1688 of the Code of Civil Procedure, as amended by an Act of the Sixth Legislative Assembly, approved February 28, 1899 (Sess. Laws 1899, p. 138), is to limit or supersede the terms of Section 1510 of the Code of Civil Procedure, in so far as the same provides that a summons issued from a justice of the peace court may be served by any male resident over the age of twenty-one years not a party to the suit. But the act of February 28, 1899, above, is not susceptible of such a construction. Section 1510, above, does not authorize a non-official person to do more than serve a summons, while Section 1688, above, as amended by the act of February 28th, is intended to provide for a special constable in any township where a constable is not elected or appointed, and seeks to invest such special constable with authority to make arrests or serve writs of attachment or execution. There is in fact no relation whatever between the provisions of Section 1510, above, and Section 1688 as amended. They seek to accomplish wholly different purposes. So far, then, as the person making the service was concerned, no valid objection can be offered to the proceedings had in the justice's court.

Apparently no attack was made upon the manner of service, but every presumption will be indulged by this court that the judgment of the district court is correct, and the same will not be reversed unless prejudicial error is made to appear. Therefore, if that judgment can be sustained, it will be.

The return on the summons, quoted above, shows that service was made by delivering to the defendants Reagan and Long a copy of such summons. Is this a sufficient service to give the

justice of the peace court jurisdiction of the defendants?

Section 1510, above, provides that a summons from a justice of the peace court must be served and returned as provided in Title V, Part II, of the Code of Civil Procedure. That portion of the Code, among other things, provides for the manner of service of summons in the district court. Therefore a summons from a justice of the peace court must be served in the manner provided by law for the service of a summons from the district court.

Sections 635 and 636 of the Code of Civil Procedure provide for the manner of service of a summons from the district court. Section 635 provides that a copy of the complaint must be served with the summons, unless two or more defendants are residents of the same county, in which case a copy of the complaint need only be served upon one of such defendants.

Section 410 of the California Code of Civil Procedure is the same in terms as our Section 635, above, and Section 849 of the California Code of Civil Procedure is the same in effect as our Section 1510, above. Construing these sections, the Supreme Court of California, in *Southern P. R. R. Co. v. Superior Court*, 59 Cal. 471, held that it was absolutely necessary that a copy of the complaint be served with the summons in order to obtain jurisdiction of the defendant, in the absence of a voluntary appearance.

The method by which a resident defendant shall be notified that an action has been commenced against him to the end that jurisdiction of his person may be obtained, is a matter subject to the control of the legislature (19 Ency. P. and Pr. 614), and in *Sanford v. Edwards*, 19 Mont. 56, 47 Pac. 212, 61 Am. St Rep. 482, this court approved the doctrine that such statutory provisions are mandatory, and must be strictly pursued, and that a failure to observe the statutory requirements in any material particular will prevent the court issuing the summons from obtaining jurisdiction of the person of the defendant.

The return on the summons in *O'Flynn v. Reagan and Long* is presumed to show all that was done by the person making the

service, and that return shows that a copy of the complaint was not served. Upon the authority of *Sanford v. Edwards* and *Southern P. R. R. Co. v. Superior Court*, above, we hold that the justice of the peace court did not acquire jurisdiction of the persons of Reagan and Long, or of either of them, and in entering their default and rendering judgment against them the justice of the peace court exceeded its jurisdiction. As the defendants were never legally or at all before that court, they had no remedy by appeal, and the remedy by writ of review was available.

As the justice of the peace court had no jurisdiction to enter the judgment in *O'Flynn v. Reagan and Long*, the judgment of the district court in annulling and setting it aside was proper, and is affirmed.

*Affirmed.*

MR. CHIEF JUSTICE BRANTLY and MR. JUSTICE MILBURN concur.

Rehearing denied December 16, 1904.

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MERK ET AL., RESPONDENTS, v. BOWERY MINING  
COMPANY, APPELLANT.

(No. 1,969.)

(Submitted October 20, 1904. Decided November 17, 1904.)

*Mines—Lease—Option Purchase—Quieting Title—Pleading—  
Contracts—Appeal—"Adverse Party."*

1. In an action by plaintiffs against their lessee and defendant to quiet title to mining property, *held*, that, under the particular circumstances, the lessee was not an "adverse party" (within the meaning of Code of Civil Procedure, Section 1724) on whom defendants were required to serve notice of appeal.
2. The alleged insufficiency of the evidence cannot be considered on appeal where the record does not show that it contains all, or the substance of all, the evidence.

31	298
31	454
31	298
41	570

3. Under Code of Civil Procedure, Section 1003, providing that the court may grant relief consistent with the complaint, a prayer for such other and further relief as may be meet and agreeable to equity and good conscience warrants the granting of any relief to which plaintiff is entitled on the allegations and proof.
4. Under Code of Civil Procedure, Section 1310, providing that an action may be brought by any person against another who claims an interest or estate in land adverse to him, to determine such adverse claim the complaint need only allege that plaintiff is the owner, and that defendant claims some adverse right, and a complaint is not objectionable because it alleges defendant's claim to be different from that set up in the answer.
5. An action seeking to remove as a cloud on plaintiffs' title defendant's claim under a contract giving them an option to purchase, which plaintiffs had declared forfeited before commencement of the action, is not an action to declare a forfeiture.
6. Where plaintiffs gave a lessee an option to purchase, and the lessee gave defendant an option to purchase from him, pursuant to which defendant made a payment to the lessee, who turned it over to plaintiffs, they were not required to return it to defendant in order to maintain a suit against defendant to remove its claim as a cloud on the title.
7. Where plaintiffs gave an option to purchase their mining property by the payment of the price in installments at certain dates, time being of the essence, they were not required, on declaring a forfeiture for failure to pay the price as required, to return an installment paid.
8. Time is of the essence of an option to purchase mining property.
9. Where a lease of mining property for royalties gave the lessee an option to purchase by paying in installments, and the time for payment of some installments was extended by an agreement which provided that the extension applied only to the payments for purchase, and did not affect the original contract in any other respect, the lease was not extended.
10. A contract leasing and giving an option to purchase mining property provided for the payment of royalties and of the price in installments if the option should be exercised, and declared that, if the lessee should not perform all the conditions, the agreement should be "void *ab initio*." An extension of time for the payment of installments was given, the supplemental agreement granting it providing that, if the lessee should fail to comply with the contract as modified, such failure should cause a forfeiture. *Held*, that this modified the provision of the original contract that failure to perform should render it void *ab initio*.

*Appeal from District Court, Madison County; M. H. Parker, Judge.*

ACTION by F. R. Merk and another against the Bowery Mining Company and others. From a judgment for plaintiffs, and from an order overruling a motion for a new trial, defendant Bowery Mining Company alone appeals. Respondents filed a motion to dismiss the appeal. Motion overruled, and judgment affirmed.

*Mr. W. A. Clark, Messrs. McBride & McBride, and Mr. E. Horsky, for Appellant.*

*Mr. Edmund J. Callaway, and Messrs. Word & Word, for Respondents.*

MR. COMMISSIONER CLAYBERG prepared the following opinion for the court:

This is an appeal by the Bowery Mining Company from a judgment against defendants and from an order overruling its motion for a new trial.

Counsel for respondents moves the court to dismiss the appeal on the ground that the notice of appeal was not served on John Berkin, one of the defendants, who is claimed to be an adverse party within the meaning of the statute. (Code of Civil Procedure, Section 1724.) This motion must be disposed of before entering into a consideration of the case, because, if granted, this court has no jurisdiction to investigate the merits of the appeals.

The suit was for the purpose of removing a cloud from the title to plaintiffs' mining claims, to quiet their title thereto, and to enjoin the defendants from prosecuting two actions then pending against plaintiffs—one of forcible entry and detainer to recover possession of said premises, the other for conversion of personal property; but from the record presented on these appeals it is apparent that upon the trial of the case all questions as to the injunctions to restrain the prosecution of these suits were omitted, and the case tried solely upon the issues of removing the alleged cloud from plaintiffs' title to the property and quieting the same. The defendants Berkin and the Bowery Mining Company filed separate answers, to which reference will be hereafter more specifically made.

Upon the motion for dismissing the appeal the only question to be considered is whether Berkin is an adverse party upon whom notice of appeal should have been served. Appellant concedes that the notice of appeal was not served upon him. In order to determine this question, a brief reference to the pleadings, the facts shown at the trial, the findings of the court, and



the decree is necessary. It seems that respondents, being the owners of certain quartz claims, gave Berkin an option to purchase them upon the payment of \$80,000 at different times, the last payment being due February 15, 1901. They also, by the same instrument, leased the property involved to Berkin upon certain considerations, which lease was to expire on the 15th day of February, 1901. Berkin afterward entered into an agreement with the Bowery Mining Company, whereby he gave to such company an option to purchase from him the same property on the payment of \$100,000, the last payment to be made February 1, 1901, and leased the property to the company upon the same conditions as were expressed in the lease to him from plaintiff, except that the lease was to expire on February 1, 1901. The company entered into the possession of the property, and commenced the performance of its agreement with Berkin. Some months after the execution of these agreements plaintiffs entered into a supplementary agreement with Berkin, whereby, for certain considerations, they agreed to extend the later payments of the purchase price mentioned in the agreement for a period of six months from the time they were to mature under the original agreement. Berkin subsequently made the following indorsement upon the last-mentioned agreement, or upon a copy thereof, and delivered the same to the Bowery Mining Company, viz.: "The same modifications and extensions granted to me by F. R. and M. E. Merk in the foregoing agreement are hereby granted to the Bowery Mining Co. under the sublease made by me to said company embracing the said property." The complaint, in paragraph 4 thereof, alleges that Berkin transferred the original agreement, together with his rights to operate the property, to the Bowery Mining Company, which company accepted the same and operated the property, and that on October 28, 1899, it was agreed between plaintiffs and the Bowery Mining Company that it should deal directly with plaintiffs under the agreement and lease between plaintiffs and Berkin, and should make all payments for royalties due, and all time payments, directly to plaintiffs. Berkin

alleges in his answer that after October 28, 1899, the Bowery Mining Company was the real lessee of plaintiffs under the attornment alleged in paragraph 4 of said complaint, and that, therefore, he was released and freed from all his obligations to pay plaintiffs as specified in his agreement. He admits that the lease to him from plaintiffs expired by limitation on February 15, 1901, and that plaintiffs took quiet and peaceable possession of the property on February 16, 1901, and that at the time of the commencement of the suit they were in peaceable possession thereof, and were entitled to such possession. He then "denies that he claims any right, title or interest in or to the premises mentioned in plaintiffs' complaint, or in or to the possession thereof, and thus answers to paragraph thirteenth of said complaint."

The Bowery Mining Company denies that Berkin ever assigned or transferred his agreement and lease with plaintiffs to it, and denies that it operated the property at all except under a lease from Berkin; denies that it was ever agreed that it should deal directly with plaintiffs; denies that plaintiffs peaceably took possession of the property, but alleges that they took possession by force and arms and with violence. The Bowery Mining Company then alleges by way of affirmative defense that plaintiffs made, executed and delivered to Berkin a lease and option upon the property described in the complaint, and that Berkin entered upon said property as a tenant of plaintiffs; that Berkin subsequently sublet the premises to it, and gave it an option for their purchase; that on May 9, 1900, plaintiffs gave Berkin an agreement extending said lease and option, and that Berkin gave it the same extension; that it occupied the premises as tenant of Berkin; that the plaintiffs agreed with the company to extend the time of the payment of the royalties under the lease until some time after the 15th of February, 1901, and claimed that by this agreement the royalties which were due on the 15th of February, 1901, were to be used and had been used by it in work and improvements upon the property. This is denied in the replication, and the court found that

no such contract had been entered into. The finding is in the following language: "That on or about the 19th day of January, 1901, the plaintiffs and Bowery Mining Co. had some conversation relative to a further extension of time for the payment of royalties and the cash payment on the purchase price of the property due on the 15th day of February, 1901, but no contract was fully made or completed between the parties as to such extension." The Bowery Mining Company further alleged in its answer that \$10,000 due plaintiffs on the 15th day of February, 1901, was fully paid by the additional work upon the property in its development and improvement and in the placing of improvements thereon, and that this was done with the knowledge and consent of plaintiffs, and under an agreement with plaintiffs. This is also denied in the replication, and is covered by the finding of the court above quoted. Plaintiffs filed a replication to this answer, in which they reiterated the allegations of their complaint, and alleged that, if the premises were sublet to the Bowery Mining Company by Berkin, it was in equity an assignment to the Bowery Mining Company by Berkin of the lease and option given to him by the plaintiffs. The court found that the Bowery Mining Company was the lessee of Berkin, and that the lease from plaintiffs to Berkin expired by its own limitation on February 15, 1901, and that the supplementary contracts extending the time of payment of the purchase price did not extend the lease. No question is raised by the pleadings or during the trial by either party as to the continuance of the lease and option from Berkin to the Bowery Mining Company, or as to the construction or validity of the contracts between it and Berkin, as between them.

From the circumstances and facts above detailed, and from the testimony hereinafter set forth, we must determine whether or not Berkin is an adverse party within the meaning of the statute.

The Supreme Court of California has announced the rule, and consistently followed it, that: "This court has jurisdiction to entertain an appeal only upon a compliance by the appellant

with the procedure prescribed by the legislature for taking the appeal. Section 940 of the Code of Civil Procedure requires that the notice of appeal shall be served on the 'adverse party.' Unless such service is made, this court has no jurisdiction over him, and any order or judgment it might make with reference to the judgment appealed from would be *ex parte*, and could not affect his rights, or be binding upon him. The 'adverse party' referred to in this section is defined in *Senter v. De Berna*, 38 Cal. 640, to be 'every party whose interest in the subject-matter of the appeal is adverse to or will be affected by the reversal or modification of the judgment or order from which the appeal has been taken.' In *Williams v. Santa Clara Min. Ass'n*, 66 Cal. 195, 5 Pac. 85, it was said: 'This court has not jurisdiction to hear an appeal from a judgment unless the appellant shall have served the notice of appeal on all the adverse parties—that is to say, upon all whose rights may be affected by a reversal of the judgment; or where the appeal is from part of the judgment, by a reversal of the part appealed from.' \* \* \* Whether a party to the action is 'adverse' to the appellant must be determined by their relative position on the record and the averments in their pleadings, rather than from the manner in which they may manifest their wishes at the trial, or from any presumption to be drawn from their relation to each other, or to the subject-matter of the action in matters outside of the action. It would hardly be contended that the strength or relevancy of the argument of a party at the hearing in the court below could be conclusive for the purpose of determining whether he was in reality adverse, or in accord with the matter argued. If his position on the record makes him nominally adverse, he must be so considered for the purpose of an appeal from the judgment thereon." (*Harper v. Hildreth*, 99 Cal. 265, 33 Pac. 1103.)

In the case of *T. C. Power & Bro. v. Murphy*, 26 Mont. 387, 68 Pac. 411, this court uses the following language: "A party is adverse who has an interest in opposing the object sought to be accomplished by the appeal. In the language of Chancellor

Walworth in *Thompson v. Ellsworth*, 1 Barb. Ch. 624, by 'adverse party' is meant 'the party whose interest in relation to the subject of the appeal is in conflict with the reversal of the order or decree appealed from, or the modification sought for by the appeal.' "

It must be remembered that under the answer of the Bowery Mining Company in the case there was no privity of contract, agreement or estate between the Bowery Mining Company and plaintiffs. They claim to be lessees of Berkin, and to have the right to purchase the property under an option given to it by Berkin. Berkin's right to sell or to give the lease was dependent upon the performance by him of the option and lease given him by the plaintiffs. If he failed to perform these agreements according to their terms, all his right and interest in the property ceased. It will be noticed that the decree of the court says nothing about the validity or time of expiration of the option and lease given by Berkin to the Bowery Mining Company, but it seems to go on the theory that, if plaintiffs were entitled to recover from Berkin, and have the cloud created by the record of the option and lease removed, the same effect would necessarily follow as to the rights of the Bowery Mining Company under its contract and lease with Berkin. It must also be remembered that Berkin, by his sworn answer, admitted that the lease from plaintiffs to himself expired by its own limitation on the 15th day of February, 1901, and that plaintiffs were in the peaceable possession of the property at the time the answer was filed. He is precluded from thereafter taking a position, so far as plaintiffs are concerned, in any wise to the contrary.

The Bowery Mining Company seeks to reverse the judgment of the court below upon the theory, among others, that by the supplementary agreement with Berkin dated May 9, 1900, plaintiffs extended to Berkin the time of the expiration of the lease for six months. They also claim that the supplementary agreement given to it by Berkin extended the term of the lease given to it by Berkin for a like period. We cannot consider,

as an independent proposition, whether there is anything in the last claim of the Bowery Mining Company or not, because the issues presented in the case by the pleadings raise no question as to the extension of the lease from Berkin to appellant. Nothing of this character was filed as against Berkin, and therefore there is nothing in that regard before this court for consideration.

The testimony introduced in behalf of appellant discloses that Berkin was manager of the property for appellant until about July 1, 1900, when he was succeeded by John N. Glass as manager. Berkin expected to go to Alaska, and it was agreed that all payments which were to be made to him under his contract with the Bowery Mining Company thereafter should be made directly to plaintiffs; that in December of that year there was due plaintiffs from Berkin about the sum of \$3,000 as royalties, and that the Bowery Mining Company entered into an agreement with plaintiffs for an extension of the time of payment of the same as follows: \$1,000 to be paid about the 1st of January, 1901, the balance in \$1,000 payments to be made every ten or fifteen days after the first payment, and agreed to pay the same accordingly; that the first payment was made under this agreement, but no other or further amounts were paid; that in January and the early part of February, 1901, the Bowery Mining Company negotiated with plaintiffs to be allowed to expend the remainder of said royalties and other royalties accruing and accrued upon the development of the property and in doubling the capacity of the mill; that such agreement was made with plaintiffs, but never reduced to writing; that in reliance upon said agreement defendant expended several thousand dollars upon the property in excess of the amount required by the original lease. All this plaintiffs denied in their testimony, and the court found that no such agreement was ever made. By the acts of the Bowery Mining Company above recited, as disclosed by its own evidence, Berkin was thereafter practically eliminated from the contracts, and the company took his place in all subsequent transactions thereunder with plaintiffs. All

the Bowery Mining Company's rights in and to the property in question originally came from its contract with Berkin, which necessarily depended for its validity upon the performance by Berkin of his undertakings and agreements in his contract with plaintiffs. By the action of the Bowery Mining Company above rehearsed, defendant practically assumed thereafter to take Berkin's place in his contracts with plaintiffs, and Berkin was therefore eliminated from the transactions so far as plaintiffs are concerned. They treated the Bowery Mining Company as Berkin's successor in agreeing to extend the time for paying the royalties in December, and in negotiating with it in regard to the balance of the royalties to be paid in January and February. The company acted in the place of Berkin in all these transactions, thereby excluding him therefrom. The record is silent as to whether Berkin ever knew of these transactions at the time they were pending. The contracts between appellant and Berkin were not involved in this suit, save as incidentally, and as claimed as a defense by appellant. Their construction and validity were not in any manner passed upon as between appellant and Berkin, but only as to plaintiffs. The rights of appellant against Berkin under such contracts, whatever they may be, are left undetermined and unimpaired by this suit. Any liability against Berkin in favor of appellant must arise and be based upon said contracts, and cannot arise or become fixed under or by any judgment which may be rendered in this suit. Under all these circumstances we cannot see how Berkin can be affected or injured by a reversal of the judgment upon the Bowery Mining Company's appeal, and therefore conclude that he is in no sense an adverse party upon whom notice of appeal should have been served by appellant. We therefore advise that the motion of respondents to dismiss the appeal be denied.

#### UPON THE MERITS.

It is not shown, either affirmatively, by sufficient recitals in the record, or otherwise, that it contains all, or the substance

of all, the evidence introduced at the trial of the case bearing upon the errors alleged, and under the uniform decisions of this court we cannot consider the alleged insufficiency of evidence.

Aside from the insufficiency of the evidence alleged, there are but four questions to be considered upon the merits of these appeals, viz.: (1) Does the complaint state facts sufficient to constitute a cause of action? (2) Was time the essence of the option? (3) Was the lease part of the agreement extended by the supplementary agreement of May 9, 1900? (4) What is the effect of a clause in the original contract by which it is to be made void *ab initio* upon failure upon the part of the lessee to perform?

1. As to the sufficiency of the complaint. Appellant's objections to the complaint are as follows: (a) That it is a complaint to restrain the prosecution of a pending action in forcible entry and detainer commenced by the appellant against plaintiffs. (b) That it is a complaint filed to declare and enforce a forfeiture. (c) That the plaintiffs have not done or offered to do equity, in this: that appellant paid plaintiffs \$5,000 on the purchase price of the property, and plaintiffs do not allege a return or offer of return of the same.

(a) Is the complaint to restrain prosecution of a forcible entry and detainer suit?

We need not consider whether the complaint states facts sufficient to constitute such cause of action if it does state facts sufficient to constitute a cause of action for any other relief, as the fifth subdivision of the prayer of the complaint is as follows: "That the plaintiffs may have such other and further relief as shall be meet and agreeable to equity and good conscience." This is sufficient to warrant the court in granting any relief to which the plaintiffs are entitled upon the allegations of the complaint and the proof introduced at the trial. (*Leopold v. Silverman*, 7 Mont. 266-286, 16 Pac. 580; *Gillett v. Clark*, 6 Mont. 190-192, 9 Pac. 823; *Morse v. Swan*, 2 Mont. 306-309; *Davis v. Davis*, 9 Mont. 267, 23 Pac. 715; *Klein-*



*schmidt v. Steele*, 15 Mont. 181, 38 Pac. 827; *State ex rel. Russel v. Tooker*, 18 Mont. 540, 46 Pac. 530, 34 L. R. A. 315; Section 1003, Code of Civil Procedure.)

An examination of the complaint discloses that it was filed to quiet plaintiffs' title to the premises in controversy, to remove a cloud therefrom by cancellation of instruments which they say have no validity, and incidentally for an injunction against the prosecution of two suits against them by the Bowery Mining Company for forcible entry and detainer and one for conversion of personal property. There is no doubt but the allegations of the complaint are sufficient as an action to remove a cloud from plaintiffs' title and cancel the contracts of August 15, 1899, and May 9, 1900, to Berkin, under Section 4450 of the Civil Code. (*Wiard v. Brown*, 59 Cal. 194; *Angus v. Craven*, 132 Cal. 691, 64 Pac. 1091.)

We are of the opinion that it is also sufficient to warrant a decree quieting title of plaintiffs against the adverse claim of the Bowery Mining Company. The complaint alleges that this company is assignee of the Berkin contract, and claims rights thereunder adverse to plaintiffs; but it asks in the prayer that defendants "set forth the nature of their adverse claims, and that the same may be adjudged void." The appellant sets forth a claim other than as assignee of Berkin's contracts with plaintiffs, viz., an option of purchase and a lease of the premises in question between appellant and Berkin by written contracts. This claim is adverse to plaintiffs, and the court is given jurisdiction and authority under the pleadings and Section 1310 of the Code of Civil Procedure to decide upon the validity of this claim. All the complaint is required to allege in such case is that plaintiff is owner of the premises, and that the defendant claims some right adverse to him, without specifying of what such adverse claim consists. (*Castro v. Barry*, 79 Cal. 443, 21 Pac. 946; *Montana Ore Purchasing Co. v. Boston & Montana C. C. & S. M. Co.*, 27 Mont. 288, 70 Pac. 1114.) It must ask that such claim be set forth, and its merits be adjudicated. It would be absurd to say that plaintiffs, by the setting forth that

the defendant claims adversely under a state of facts and conditions mentioned in the complaint, could preclude the defendant from setting forth any other adverse claim.

(b) As to the plaintiffs' complaint being to declare and enforce a forfeiture.

Appellant's counsel misconceive the purpose of the suit when they make this assertion. Plaintiffs claim that the forfeiture was completed by proceedings taken by them in accordance with the provisions of the contract long prior to the commencement of the suit, and that such contracts are therefore void. They do not ask the court to declare or decree any forfeiture or enforcement of the same, but simply determine whether the acts of the plaintiffs in forfeiting the contracts under their terms have been sufficient.

The language of the Supreme Court of Michigan in the case of *Pendill v. Union Mining Co.*, 64 Mich. 172, 31 N. W. 100, is very pertinent and conclusive: "Counsel for defendant further insist that the object of the bill is to declare a forfeiture of an estate for nonperformance of a condition subsequent against the rule that equity will never enforce a penalty or forfeiture. We do not think this is the proper view to be taken of the bill. The bill treats the lease as a void incumbrance, under which the defendant company, by its claims thereunder, clouds the complainant's title. The court is not asked to declare the forfeiture, but to ascertain whether or not a completed forfeiture exists, and, if so, to remove the cloud. The bill does not ask the court to do the thing, but to ascertain whether it has been done, and, if so, to declare its effect upon the title to complainant's property."

(c) As to plaintiffs' offer to do equity.

This contention is based upon the fact that plaintiffs have received \$5,000 from appellant, and do not offer to return the same. The record discloses that this money was paid by appellant to Berkin under its contract with him, and not directly to the plaintiffs, and that Berkin paid it to the plaintiffs. There-

fore plaintiffs never have received it from appellant, were not bound to account for or pay it to appellant. Berkin, from whom they received it, would be the only person, if any one, who could demand its return. He does not claim or demand it. But, even if it had been paid by appellant to plaintiffs it would not be entitled to its return under the decision of *Clark v. American Developing & Mining Co.*, 28 Mont. 468, 72 Pac. 978.

2. Was time the essence of the option?

We think it was. This court, in the case of *Clark v. American Developing & Mining Co.*, *supra*, entered very fully into the discussion of this question, and came to the conclusion that time is the essence of every contract, whereby an option is given to purchase mining property. The court said: "The contract was unilateral, and by its express terms time was of its essence. There is a decided distinction between an option to purchase, which may be exercised or not by the prospective purchaser, and an absolute contract of sale, wherein one of the parties agrees to sell and the other to buy certain property, the sale to be completed within an agreed time. In the latter case, of course, the mere lapse of time, with the contract unperformed, does not entitle either party to refuse to complete it, and therefore time is not of the essence of the contract. But where the contract is merely an option, generally without consideration, and especially as applied to mining property, of course, as pointed out in the last preceding sections, time is of its essence. The prospective purchaser must act promptly within the time specified, or his right to purchase is gone. Snyder on Mines, Sec. 1378. And see Lindley on Mines, Sec. 839; *Settle v. Winters*, 2 Idaho, (Hasb.) 215, 10 Pac. 216; Pomeroy on Contracts, Sec. 387; Fry on Specific Performance, 3d Ed., Sec. 1052."

3. Was the lease part of the agreement extended by the supplementary agreement of May 9, 1900?

We are satisfied that it was not. The purpose of the contract of May 9, 1900, was simply to extend the time in which to make the later payments provided for in

the contract of August 15, 1899, for a period of six months. It recites: "The granting of above extensions are to apply only to the time payments for purchase as specifically set forth in the original contract of August 15, 1899, and are not to apply on any royalties now due, or which may become due, or otherwise." And again: "In all other respects the original contract of August 15, A. D. 1899, to remain and be in full force and effect." While the option and lease are contained in the same paper, either might have been given without the other, and each might have been given to different parties and by different papers. They are entirely separate and distinct agreements. The option part of the agreement does not give the proposed purchaser the right to the possession of the property at all. It only provides for the sale to the intended purchaser of the property as described in the contract upon the payment of certain sums therein mentioned at certain times. The only reference to the lease part of the agreement contained in the option is that the intended purchaser at the time of making payments shall "have fully kept and performed all of the terms and conditions of this contract and the lease hereinafter given upon said property, to be kept and performed by the said party of the second part in accordance with the true and proper intent and meaning of this contract; \* \* \* but if said party of the second part, his representatives or assigns, shall fail to make any of the said payments when due, or perform any or all of the conditions of this contract and hereinafter described lease to be by him performed, then, upon such failure, this agreement shall be declared void *ab initio* and at an end." By this language the plaintiffs made it the duty of the defendant Berkin (and Berkin made it the duty of the Bowery Mining Company in his contract with that company) not only to make the payments at the time they were due according to this contract, but also to keep and perform the agreements set forth in the lease. The lease part of the agreement might have been for a time much shorter than that allowed for the payment of the purchase price. We cannot conceive any such relation between the lease

and option that an extension of the time of payment of the purchase price under the option would extend the expiration of the lease. But, even if the lease was extended, it became forfeitable by its own terms by nonpayment to plaintiffs of the royalties when due, and it was so forfeited by plaintiffs before commencement of the suit.

4. As to the *ab initio* clause.

This clause is peculiar in its statements, and the words "*ab initio*" were evidently carelessly used; but we find in the contract of May 9, 1900, the following provision, which, in our judgment, modifies this clause, and sets it aside: "Said party of the second part further agrees with the parties of the first part, that any failure that may occur at any time during the life of the original contract and this supplement, by said party of the second part, to fully comply with any of the terms in the original contract, or as modified or set forth in this its supplement, according to their true intent and meaning, or to make the payments for purchase as herein extended and specified, is to cause a complete forfeiture of the original contract, and this, its supplement, to convey and lease." We are clear that the language above quoted is a modification of the *ab initio* clause in the original contract, and makes a failure to pay the money at the time stated and specified in the two contracts a cause of forfeiture of the original contract and the supplement.

After a very full and careful consideration of the record, we are satisfied that the motion to dismiss the appeal made by respondents should be overruled, and that the judgment and order appealed from should be affirmed.

MR. COMMISSIONER CALLAWAY, being disqualified, takes no part in the preparation of this opinion.

PER CURIAM. —For the reasons stated in the foregoing opinion, the judgment and order are affirmed.

*Affirmed.*

## BOND, RESPONDENT, v. HURD, APPELLANT.

(No. 1,961.)

(Submitted October 19, 1904. Decided November 28, 1904.)

*Master and Servant—Injuries to Servant—Medical Services—  
Liability of Master—Actions—Change of Venue—Evidence  
—Burden of Proof—Appeal—Agency.*

1. Where a motion for a new trial was made on a bill of exceptions, and not on a statement of facts, it was not objectionable for failure of such bill to contain a specification of errors.
2. Where an appeal was taken from a judgment and from an order denying a new trial, a motion to dismiss the appeal on the ground that the record or statement on the motion for a new trial did not contain a specification of errors was properly denied, since such objection was not ground for dismissal of the appeal from the judgment.
3. Where at the time suit was brought in B. county, where plaintiff resided, on a cause of action included within Section 613, Code of Civil Procedure, defendant was a *bona fide* resident of V. county, in which he was served, defendant was entitled to a change of venue to V. county as a matter of right.
4. Where two of the three causes of action alleged in a complaint were actions on an open account for medical services rendered in B. county, and not on express contracts to render such services, plaintiff was not entitled to sue thereon in B. county, under Section 613, Code of Civil Procedure.
5. Where two of three causes of action alleged in a complaint were such that defendant was clearly entitled to a change of venue to the county in which he resided, plaintiff was not entitled to abridge such right by joining in the complaint a third cause of action which might be properly triable in the county where the suit was brought.
6. In an action against a master for medical services rendered a servant who was injured while performing his duties, it appeared that one W. telegraphed to defendant from the place where the injury occurred, asking whether defendant would pay the "doctor's bill." Defendant answered by wire to the sender of the former message. *Held* that, since W. initiated the correspondence, the telegraph company was his agent, and not that of defendant, and hence defendant's reply telegram delivered to the company for transmission was the original, for evidentiary purposes, and not the reply telegram delivered by the telegraph company to W.
7. Where plaintiff relied on a telegram the burden was on him to prove the loss of the original, to authorize the admission of a copy.
8. Where an agent was authorized by a master to employ medical assistance for an injured servant, such agent had no authority to delegate to a physician employed authority to employ an assistant.

*Appeal from District Court, Beaverhead County; M. H. Parker, Judge.*

ACTION by H. A. Bond against C. S. Hurd. From a judgment in favor of plaintiff, and from an order denying a motion for a new trial, defendant appeals. Reversed.

*Mr. George E. Hurd*, for Appellant.

*Mr. W. S. Barbour*, for Respondent.

MR. COMMISSIONER CLAYBERG prepared the following opinion for the court:

Appeal by defendant from a judgment in favor of plaintiff, and from an order refusing a motion for a new trial.

There are three causes of action stated in the complaint—one on account for medical services rendered by plaintiff, at the request of defendant, for the benefit of one William Walters; one on account for medical services rendered by Dr. Miller, at the request of defendant, for the benefit of one William Walters, and assigned to plaintiff; and one on account of labor performed by one Williams at the request of the defendant, assigned to plaintiff. An answer was filed to this complaint, practically denying all the allegations thereof. Defendant made a motion for a change of venue in accordance with the statute, within the proper time, which was overruled. The case was then tried before a jury (the defendant introducing no evidence), and resulted in a verdict and judgment for plaintiff, after which defendant made a motion for a new trial, which was overruled. The record on appeal consists of the judgment roll and bill of exceptions.

Counsel for respondent asks that the appeal be dismissed for two reasons, viz.: (1) Because appellant failed to file or serve his notice of intention to move for a new trial within ten days of the rendition and filing of the verdict; and (2) because "the record or statement on motion for a new trial does not contain anywhere any specifications of error of law or of fact, as required by Subdivision 3 of Section 1173 of the Code of Civil Procedure." There is no merit in this motion. The record dis-

closes that the verdict was returned and filed November 18, 1902; that the notice of intention to move for a new trial was served on November 24, 1902, and filed on November 25, 1902. The motion for a new trial was made upon a bill of exceptions and not upon a statement settled under Subdivision 3 of Section 1173 of the Code of Civil Procedure. This bill of exceptions was doubtless settled under the provisions of Section 1155 of the Code of Civil Procedure, as directed by Subdivision 2, Section 1173, Code of Civil Procedure. This section does not require a bill of exceptions to contain the specifications which are required by Subdivision 3 of Section 1173 of the Code of Civil Procedure to be inserted in a statement on motion for a new trial. The only specification required in bills of exceptions is: "When the exception is to the verdict or decision on the ground of the insufficiency of the evidence to justify it the objection must specify the particulars in which such evidence is alleged to be insufficient." (Section 1152, Code of Civil Procedure.) Again, the motion is to "dismiss the appeal," and the ground stated would not be cause for a dismissal of the appeal from the judgment, even if sufficient to warrant a dismissal of the appeal from the order refusing a new trial.

Appellant only specifies three errors in his brief: (1) The action of the court in denying appellant's motion for a change of venue; (2) in admitting in evidence a certain telegram; and (3) in denying appellant's motion for nonsuit as to respondent's second cause of action.

1. As to ruling on motion to change the place of trial: The affidavit on this motion discloses that summons was served at the town of Glasgow, Valley county, Montana, and that the defendant, at the time of the commencement of the suit and of such service, and at the time of filing the motion, was an actual, *bona fide* resident of the county of Valley, state of Montana; that the plaintiff, at the time of the commencement of the action and issuing of summons, resided in the county of Beaverhead, state of Montana. The suit was commenced in Beaverhead county. The question as to the right to a change of venue



under similar circumstances was before this court in the case of *McDonnell v. Collins*, 19 Mont. 372, 48 Pac. 549, where it was said: "We think this is an action of that character which Section 613, Code of Civil Procedure, requires to be brought in the county where the defendants, or some of them, reside at the commencement of the action, or where the plaintiff resides, and the defendants, or any of them, may be found. It is not disputed that both defendants resided in Cascade county at the time this action was commenced, and that they were both served with summons in this suit in Cascade county; nor is it claimed that either of them was found in Fergus county. We think, under the showing made by the defendants, that the court erred in refusing to change the venue of the case to Cascade county." Counsel for respondent, however, contends that "this suit was instituted for the collection for services performed in Beaverhead county. \* \* \* There are three causes of action alleged in the complaint, and in each cause it is alleged that the services or contracts were to be performed, and were performed, in Beaverhead county. \* \* \* All the services sued for were to be performed, and were necessarily performed, in Beaverhead county." Section 613, under which the case of *McDonnell v. Collins*, *supra*, was decided, in the latter part of the section, provides that "actions upon contracts may be tried in the county in which the contract was to have been performed." The first and second causes of action herein are unquestionably actions upon open account for the reasonable value of medical services rendered at the request of defendant, and not actions upon express contracts, as contemplated in Section 613, *supra*, at all. There may be some doubt as to whether the third cause of action is based upon express contract or open account. However, this is immaterial. The defendant was clearly entitled to a change of venue upon the first and second counts, and, under former decisions of this court, plaintiff cannot abridge this right by joining in the same complaint another cause of action which might be properly construed as triable in Beaverhead county. (*Yore v. Murphy*, 10 Mont. 304, 25 Pac. 1039; *Wallace v.*

*Owsley*, 11 Mont. 219, 27 Pac. 790; *Ah Fong v. Sternes*, 79 Cal. 30, 21 Pac. 381.) The statute does not provide that actions for the recovery of money due for services may be tried in the county where the services are performed, but that an action on contract may be tried in the county "in which the contract was to have been performed." The case of *Oels v. Helena & Livingston Smelting & Reduction Co.*, 10 Mont. 524, 26 Pac. 1000, is not contrary to the above decision.

2. As to the admission in evidence of the telegram: The second cause of action was for medical services rendered by one Dr. Miller to one Walters, an employe of defendant, who had been sent to Beaverhead county to receive some of defendant's horses gathered by one Williams. In moving these horses, Walters was thrown from one of them, and very seriously injured. Plaintiff was called to attend Walters, and, finding him seriously injured, he called in Dr. Miller to assist him. The record discloses that Williams telegraphed to defendant, after the injury occurred, to the effect that Walters was hurt—still unconscious—and asked him whether he would pay the "doctor's bill." The admission of the answer of defendant to this telegram is the error alleged. The court allowed plaintiff to introduce in evidence the copy of the telegram received by Williams from the telegraph office in Dillon, defendant having sent the message from Glasgow. Defendant's attorney objected to its introduction on the ground that it was a copy, and not the original sent by defendant, and that there was no such showing that the original could not be produced as would warrant the introduction of a copy. The current authorities seem to be almost uniformly to the effect that whether the telegram filed with the telegraph company for transmission, or the one delivered by the telegraph company to the person addressed, after transmission, is the original, for the purpose of evidence, depends upon whether the telegraph company is the agent of the one sending the telegram, or the one to whom it is sent; that, if one initiates correspondence by telegraph, he selects the telegraph company as his agent, which agency continues throughout the correspond-

ence, and a telegram delivered to the company for transmission in reply to the one first sent is the original, for the purpose of evidence. In this case the record discloses that A. G. Williams sent a telegram from Dillon to defendant at Glasgow, and defendant replied thereto. Under the above rule, the message delivered by the defendant to the telegraph company at Glasgow for transmission to Williams at Dillon was the original for evidentiary purposes, and the one delivered by the telegraph company to Williams after its receipt in Dillon was but a copy. (*Durkee v. Vermont Cent. R. Co.*, 29 Vt. 127; *Anheuser-Busch Brew. Ass'n v. Hutmacher*, 127 Ill. 652, 21 N. E. 626, 4 L. R. A. 575; *Wilson v. Minneapolis & N. W. R. Co.*, 31 Minn. 481, 18 N. W. 291; *Saveland v. Green*, 40 Wis. 431; *Smith v. Easton*, 54 Md. 138, 39 Am. Rep. 355; *Howley v. Whipple*, 48 N. H. 487; *Thompson on Electricity*, Secs. 497, 502.) Under the statutes of Montana, the burden was upon plaintiff to show that the original telegram was lost, before he should have been allowed to introduce secondary evidence of its contents. (Section 3228, Code of Civil Procedure.) The record is barren of any such showing, and therefore we are of the opinion that the court erred in admitting it in evidence.

As to the motion for nonsuit on plaintiff's second cause of action: This cause of action, as above stated, was on account of medical services rendered by Dr. Miller to one Walters in the employment of defendant, which account is alleged to have been assigned to plaintiff. The record contains no evidence showing or tending to show the employment of Dr. Miller by defendant, or by any one as agent for him, duly authorized. The case seems to have been presented to the court below by plaintiff upon the theory that he (plaintiff) was employed by Williams, acting as the agent of defendant, and that Williams, as such agent, delegated to plaintiff authority to employ Dr. Miller as an assistant. For the purpose of discussing the question under consideration, we shall consider the telegram sent to Williams by defendant as properly in the record, for the reason that plaintiff may upon another trial introduce the original, or

make proper proof to warrant the introduction of a copy. The only evidence in the record upon which agency could possibly rest is the telegrams passing between Williams and defendant—the telegram of Williams to defendant announcing that Walters had been hurt, and asking if he would pay the “doctor’s bill,” and defendant’s telegram in reply, announcing that he would do so. Plaintiff saw this telegraphic answer of defendant, accepted the offer therein contained, and acted upon it. No direct authority is given Williams to employ a physician, so that any agency on the part of Williams was implied from the telegrams. However, no agency can be implied from these telegrams which would authorize Williams to delegate to plaintiff the right to engage the assistance of other physicians, and bind defendant to liquidate their charges. The agent’s power to delegate authority is statutory in this state (Section 3140, Civil Code); and the testimony does not disclose that Williams lawfully delegated to plaintiff authority to employ Dr. Miller, as herein contended, within any of the provisions of this section.

The court below in overruling the motion for nonsuit based his ruling on the ground that an emergency arose which justified the employment of Miller. In our opinion, neither substituted agency nor emergency is sufficient to hold defendant liable for the charges of Dr. Miller. Presumptively, plaintiff, when he was employed, assumed that he was a competent physician, and capable of taking care of the case for which he was employed without assistance. If he concluded that assistance was required, before procuring the same it was his duty, if he desired to hold defendant liable for the payment of the bills of an assistant, to communicate with him and obtain his consent to the employment. He knew where defendant resided, and knew of the telegraphic correspondence between him and Williams, and could have communicated with him. If the plaintiff had the right to employ Miller and make the defendant liable for his services, he would have had a like right to employ as many other physicians as he might have deemed necessary, and compelled defendant to have paid them all.

There would be very grave doubt as to the liability of defendant to furnish to Walters medical assistance upon the facts disclosed in the record, aside from the above telegrams. The accident by which Walters was injured may have arisen from his own personal negligence, or from a direct violation of the instructions given him by defendant. The law is by no means settled that an employer is liable to furnish an employe with medical aid under all circumstances. Many courts of last resort have held that even a railroad company is not liable to furnish an employe with medical assistance in case of accident. There the work of the employe is at all times dangerous in its character, and the reason for holding the railroad company liable to furnish such medical assistance in case of accident is much stronger than it is where an individual employs another to perform a service which is not dangerous in itself.

After an investigation of authorities, we conclude that the holding of the Supreme Court of Indiana in matters of this character is the correct one, and should be followed. In the case of *Terre Haute & Indianapolis R. Co. v. McMurray*, 98 Ind. 358, 49 Am. Rep. 752, a brakeman on one of the defendant's trains was injured at a way station along the line of the road, distant many miles from the main offices of the railroad company. The conductor of the train employed McMurray as a physician and surgeon to attend the brakeman. The injury demanded immediate surgical attention, and the conductor informed McMurray that the railroad company would pay him for such services. The supreme court, by Justice Elliott, delivered a very elaborate and learned opinion on the question of the railroad's liability, and concluded that such an urgent necessity arose for the employment of the surgeon that the conductor had authority to bind the corporation by such employment. That court seems to place the liability on the ground of emergency and urgent necessity.

It appears from the case of *Terre Haute & Indianapolis R. Co. v. Brown*, 107 Ind. 336, 8 N. E. 218, that McMurray (plaintiff in the above case) employed Dr. Brown to assist him

in the care of the brakeman. McMurray said to the conductor that he would need assistance, and the conductor replied: "I have not time to attend to this matter at all. You secure what assistance is necessary to do this man good work, and do it, and the railroad company will pay you and your assistants for it, whatever is necessary—whatever it is worth." After the judgment in the case of McMurray was affirmed, Dr. Brown brought suit against the railroad company to recover his fees for services. The court says: "If it be conceded that such an overwhelming emergency might arise as would create a necessity for immediate action in order to save life or prevent great bodily suffering, and that under such circumstances a state of affairs might exist, in the presence of which one employe would have the implied power to bind the employer, in his absence, for necessary medical or surgical aid bestowed on another employe who sustained an injury, it by no means follows that the appellee was entitled to recover upon the facts in this case. If the emergency was such that we must assume that an imperious necessity existed, under which the conductor, from considerations of humanity, had authority to employ Dr. McMurray at the expense of the company, we cannot indulge the further presumption that it was necessary that he should have the power to authorize Dr. McMurray to employ other surgeons at the company's expense. Whatever authority the conductor had in that connection arose out of an implied agency, under which, owing to the peculiar circumstances under which he was placed, he might bind his principal by employing necessary surgical aid for the injured brakeman. No rule in the law of agency is better settled than that, where an agent has authority to do a particular thing, he must do it himself. He cannot, unless specially authorized, or in pursuance of some usage, delegate his authority to another. *Lyon v. Jerome*, 26 Wend. 485, 37 Am. Dec. 271; Story, Agency, Sec. 13. Assuming that the conductor, under the circumstances disclosed, had adequate authority to secure necessary surgical aid to attend the injured brakeman at the company's expense, it cannot be assumed that

he had authority to employ one surgeon, and authorize him to employ, at the company's expense, as many more as he should think necessary. If the surgeon first employed found it necessary or convenient to call in other assistants, in order to accomplish that which he had been employed to do, in the absence of other employment than such as appears in this case, the assistants must look to him for compensation. This is according to the well-settled rule that if an agent employs a subagent to do the whole or any part of that which he was employed to do, without the knowledge or consent of his principal, inasmuch as there is no privity between the principal and the sub-agent, the latter will not be entitled to claim compensation from the principal."

The *Brown Case*, above quoted from, is much stronger than the case at bar. We are satisfied that the record fails to show any such emergency as authorized the employment of Miller, or that Dr. Miller was employed by any one having competent authority to that end.

We have not been assisted by brief or argument or respondent's counsel on the last two propositions decided.

We advise that the judgment appealed from be reversed, and the cause remanded, with instructions to the district court to grant the motion for a change of the place of trial.

PER CURIAM.—For the reasons stated in the foregoing opinion, the judgment is reversed, and the case remanded, with instructions to grant the motion for a change of place of trial.

MR. JUSTICE MILBURN: I concur, except as to the change of the place of trial.

*Reversed and remanded.*

## HARMON, RESPONDENT, v. FOX, APPELLANT.

(No. 1,906.)

(Submitted October 20, 1904. Decided November 28, 1904.)

*Pleading — Complaint — Sufficiency — Answer — Waiver of Objections to Complaint.*

1. Code of Civil Procedure, Section 570, requires every action to be prosecuted in the name of the real party in interest. A count of a complaint alleged that plaintiff granted to defendant the privilege of selling certain articles at a specified race track for a certain time, and that defendant used the privilege for such time, that it was reasonably worth a specified sum, that plaintiff owned the claim against defendant, and that defendant refused to pay. *Held*, that the count was not subject to an objection that it did not state a cause of action, on the ground that it did not allege that plaintiff was the owner of the privilege granted, that there was no allegation of value, and that it was not alleged that the sum claimed had not been paid.
2. Where the complaint in an action to recover a sum alleged to be due plaintiff for a privilege granted defendant to sell certain articles in a certain territory was defective with reference to an allegation of nonpayment by defendant, the defect was cured by defendant's answer admitting nonpayment.
3. Whatever is necessarily implied from an express allegation in a pleading need not otherwise be averred.

*Appeal from District Court, Silver Bow County; E. W. Harney, Judge.*

ACTION by Joe V. Harmon against J. F. Fox. From a judgment in favor of plaintiff, and from an order denying a new trial, defendant appeals. Affirmed.

*Mr. H. Lowndes Maury, for Appellant.*

*Mr. George A. Clark, and Mr. J. Bruce Kremer, for Respondent.*

MR. COMMISSIONER POORMAN prepared for the court the following opinion:

This is an appeal from a judgment, and from an order overruling defendant's motion for a new trial.



1. The complaint is in two counts, and alleges, substantially, in the first count:

First. That plaintiff granted to defendant the exclusive privilege of selling certain articles of merchandise at the Butte race track for a period of forty-three days, and that defendant promised and agreed in writing to pay the sum of \$550 therefor, payable in installments; the last payment to be \$185 on August 25, 1901.

Second. That defendant received the privilege, and used and enjoyed the same during said period; that plaintiff is the owner of defendant's written promise, but that defendant neglected and refused to pay plaintiff said \$185, or any part thereof.

In the second cause of action it is alleged that plaintiff granted to defendant the exclusive privilege of selling certain articles of merchandise at the Butte race track for the period of thirteen days in the months of August and September, 1901, and that defendant used and enjoyed said privilege for said time; second, said privilege was reasonably worth the sum of \$166.27; third, plaintiff now owns said claim against defendant, and said claim is payable, and defendant refuses to pay the said sum, or any part thereof.

The defendant, in answering the complaint, admits the execution of the agreement named in paragraph 1 of the plaintiff's first cause of action; admits that he received and exercised the privilege of selling the merchandise therein named for the period of forty-three days, and for the further period of thirteen days; but claims that the thirteen days were included in the original contract, and that plaintiff is not entitled to any extra pay therefor.

The written agreement by which plaintiff granted to defendant this privilege is as follows: "I, the undersigned, hereby agree to give to J. F. Fox the exclusive privilege of selling fruits, candies, peanuts, popcorn and gum at the Butte race track for the racing season of 1901, the said racing season to consist of forty-three racing days. Upon payment of five hun-

dred and fifty (\$550) dollars, in payment as follows: One hundred and eighty-five dollars one day before races start. One hundred and eighty dollars the 1st of August, and the balance, one hundred and eighty-five dollars, on August 25th." There is also in evidence a written agreement, in similar form, by the terms of which defendant agreed to pay the sum of \$550 to plaintiff.

The defendant attacks the second count in the complaint as not stating facts sufficient to constitute a cause of action, for the reason that it is not alleged in that count that the plaintiff was the owner of the privilege granted, and that the complaint does not allege that the sum claimed has not been paid, and that there is no allegation of value.

The first two objections raise questions of pleading—as to whether paragraphs numbered 1 and 3 in the second cause of action contained sufficient allegations of ownership in the plaintiff and nonpayment by defendant. These allegations are to the effect that plaintiff granted to defendant certain privileges, and is the owner of the claim against defendant therefor. Construing these terms in connection with other allegations of the complaint, the meaning undoubtedly is that the plaintiff sold certain privileges to the defendant; that the defendant accepted the same, and acted thereon.

It is a principle of pleading that whatever is necessarily implied from an express allegation need not be otherwise averred. (*Baysinger v. People*, 115 Ill. 419, 5 N. E. 375.) "If facts are pleaded from which an ultimate fact necessarily results, it is the same as though such ultimate fact were specifically pleaded." (Boone, Code Pleading, par. 10.) "Facts necessarily implied should not be stated." (Bliss, Code Pleading, par. 176.)

Our statute requires every action to be prosecuted in the name of the real party in interest. (Section 570, Code of Civil Procedure.)

In *Russell v. Clapp*, 7 Barb. 482, it is said that it is "enough for the plaintiff to allege the sale and delivery of the goods. \* \* \* If the defendant would avoid the plaintiff's right to recovery by showing that some other person, and not the plaintiff, is the real party in interest, he must state in his answer such facts as, when established by proof, will enable the court to say, as a matter of law, that the plaintiff is not the real party in interest." See, also, *Evans' Adm'r v. Exchange Bank*, 79 Mo. 182; *Duzan v. Meserve*, (Ore.) 34 Pac. 548.

In *Phillips v. Bartlett*, 9 Bosw. (N. Y.) 678, the complaint alleged: "The plaintiff sold and delivered to defendant, at his special instance and request, a large \* \* \* quantity of boots and shoes,' of a certain value, and that there is due and unpaid therefor 'a certain sum, which the defendant promised to pay the plaintiffs, but, though often requested' by them, has wholly refused to pay it." A demurrer was filed on the ground that the complaint did not state facts sufficient to constitute a cause of action, but the court held the complaint good as to the allegations of ownership and nonpayment.

We do not think the complaint is open to the objection made. Furthermore, in this particular case, the complaint not having been demurred to, the plaintiff testified on the trial, without objection, that he was the owner of this privilege at the time he made the grant to the defendant, and the answer admitted that the defendant had not paid the sum demanded for this extra thirteen days. If the complaint is defective with reference to the allegation of nonpayment, it was cured by the allegations of the defendant's answer. (*Grogan v. Valley Trading Co.*, 30 Mont. 229, 76 Pac. 211.)

Paragraph 2 of the second cause of action consists of a direct allegation as to the reasonable value of this privilege.

Certain minor objections are mentioned in the specification of errors, but are entirely ignored in the argument. We will say, however, that there is nothing ambiguous about this contract as to the time limit therein mentioned.

We think the judgment and order appealed from should be affirmed.

PER CURIAM.—For the reasons stated in the foregoing opinion, the judgment and order are affirmed.

*Affirmed.*

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34	568

31	328
35	17
35	61

31	328
39	453

31	328
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GALLICK, RESPONDENT, v. BORDEAUX ET AL.,  
APPELLANTS.

(No. 1,951.)

(Submitted October 1, 1904. Decided November 28, 1904.)

*Sheriffs and Constables—Wrongful Seizure of Property—Actions—Claim and Delivery—Pleading—Parties—Sureties on Bond—Title to Property Seized—Burden of Proof—Instructions—Assumption of Facts—Submission of Questions of Law.*

1. It is error for the court in its charge to assume as proven a fact which is in issue.
2. In an action against a constable for the wrongful seizure of property under execution the questions whether the justice had jurisdiction of the parties and of the subject-matter, whether the judgment was wrongfully made, and whether the execution was in due form, were questions of law, and instructions that those things must appear in order to make out the defense of justification under the writ were erroneous in submitting legal questions to the jury.
3. In an action in claim and delivery for property wrongfully seized by a constable under execution, where plaintiff alleged that he was the owner of the goods when seized, which the answer denied, the burden was upon plaintiff to prove the ownership or right of possession, and in relying upon a sale from the execution defendant it was incumbent upon him to show a valid sale.
4. In an action in claim and delivery for property wrongfully seized under execution defendant could, under a general denial of plaintiff's ownership of the goods seized, show that a sale under which plaintiff claimed was void.
5. Under Code of Civil Procedure, Section 1220, providing that, if personal property levied upon under execution be claimed by a third person, the same proceedings shall be had as provided in relation to attachment, in Section 906 of said Code, which provides for notice of claim to the officer, and a delivery of the property to the claimant, unless plaintiff gives an indemnify-

ing bond, the officer is not bound to deliver possession to the claimant if the execution plaintiff furnishes an indemnifying bond.

6. In an action in claim and delivery for property wrongfully seized by a constable under an execution, where plaintiff claimed title by virtue of a sale from the execution defendant, the burden of proof which was upon him to establish a *bona fide* sale was not shifted by mere proof of notice of claim to the constable at the time of the levy.
7. In an action in claim and delivery plaintiff must recover upon the strength of his own title, and not upon the weakness of defendant's title, and an instruction authorizing a verdict for plaintiff if there were some particular defects in the justification relied upon by defendant is erroneous.
8. In an action in claim and delivery, brought by a mortgagee for the wrongful seizure of property under a writ of execution, the measure of damages if return of the goods cannot be had is the value of the goods up to the amount of the indebtedness, with accrued interest, and not the value of the property and the amount of the indebtedness with interest.
9. Instructions covering a feature of the case properly covered by other instructions given may be refused.
10. In an action in claim and delivery for property wrongfully seized under execution, an instruction authorizing a verdict for defendant unless the sale under which plaintiff claimed was followed by "an actual and continued change of possession" was improperly modified by striking out the words "and continued."
11. The action of claim and delivery lies only against the party in possession, and when brought against a constable for the wrongful seizure of property under a writ of execution the sureties on his official bond are improperly joined as parties defendant, where they were not in any manner concerned with the seizure or detention of the property.
12. In an action in claim and delivery, in order to state a cause of action, the complaint must not only allege ownership or right of possession in the plaintiff, but it must allege the wrongful seizure and detention of the property by the defendant.

*Appeal from District Court, Silver Bow County; William Clancy, Judge.*

ACTION by Emanuel Gallick against Thomas J. Bordeaux and others. From a judgment for plaintiff, and from an order denying a new trial, defendants appeal. Reversed.

For former opinion, see 22 Mont. 470, 56 Pac. 961.

*Mr. C. P. Drennen*, for Appellants.

The court erred in refusing to allow defendants to interrogate the witness Heilbronner in re-direct examination. The defendants had the unqualified right under the statute (Code of Civil Procedure, Sec. 3378) to re-examine the witness after his cross-examination by the plaintiff's attorney. In the cross-examination he was examined as to new matter which was not

mentioned in his direct examination. Such right is not dependent upon the discretion of the court; the court had no discretion in the matter. (*Hamilton v. Miller*, 46 Kan. 486; *Gray v. Cooper*, 65 N. Car. 183; *State v. Hopkins*, 50 Vt. 316; *Commonwealth v. Dill*, 158 Mass. 226; *Merritt v. Campbell*, 79 N. Y. 625; *Nay v. Curley*, 113 N. Y. 575; *Howe v. Schweinberg*, 4 Misc. Rep. 73; *Goodman v. Kennedy*, 10 Neb. 270; *Bassham v. State*, 37 Texas, 622; *Farmers' etc. Bank v. Young*, 36 Iowa, 44; *People v. Smallman*, 55 Cal. 185; *Roberts v. Roberts*, 85 N. Car. 11; *Cabiness v. Martin*, 4 Dev. (N. C.) 106; *Alderton v. Wright*, 81 Mich. 279; *Lally v. Emery*, 79 Hun. 560; *Walsh v. Porterfield*, 87 Pa. St. 276; *Somerville, etc. R. R. Co. v. Doughty*, 22 N. J. Law, 495; *Todd v. Vaughn*, 90 Hun. 70; *Taylor v. Commonwealth*, (Ky.) 34 S. W. 227; *Fairchild v. Cal. Stage Co.*, 13 Cal. 606; *Tyler v. Healey*, 51 Cal. 191; *Schutzel v. Huron*, 6 S. Dak. 140; *State v. McClellan*, 26 Mont. 538; *People v. Fultz*, 109 Cal. 258; 8 Ency. Pl. and Pr. 123, 124, and cases cited; *Robinson v. Dugan*, (Cal.) 35 Pac. 902.

The court erred in its instructions. (*Savacool v. Boughton*, 5 Wend. 170; *Fuller Disk Co. v. McDade*, (Cal.) 45 Pac. 694; 1 Freeman on Executions, 2d Ed., 218, 220; *Caldwell v. Center*, 30 Cal. 540; *Wastl v. Montana Union Ry. Co.*, 17 Mont. 217; Compiled Statutes of Montana, 1887, p. 653, Sec. 226; *Kipp v. Silverman*, 25 Mont. 297; *Grum v. Barney*, 55 Cal. 256; *Stephens v. Halstead*, 58 Cal. 193; *Humphreys v. Harkey*, 55 Cal. 283; *Gallick v. Bordeaux*, 22 Mont. 479; Civil Code of Montana, Secs. 3861-5; Compiled Statutes of Montana, p. 269, Sec. 805; p. 270, Sec. 806; Code of Civil Procedure, Sec. 1661.)

The evidence was insufficient to sustain the verdict of the jury. (*Ghiradelli v. Bourland*, 32 Cal. 588-89; *Sam Yuen v. McCann*, 99 Cal. 499; 15 Ency. Pl. and Pr. 118, VII; *Huston v. Hagar*, (Ky.) 1 Duc. 24.)

*Mr. John J. McHatton*, and *Mr. George F. Shelton*, for Respondent.

The mode of examination of a witness is subject to the reasonable control of the court. (Code of Civil Procedure, Secs. 3372, 3373; *Swetser v. Dobbins*, 2 West Coast Rep. 143; 1 Rice on Evidence, p. 601; *Jaspers v. Lano*, 17 Minn. 296; *Brumagin v. Bradshaw*, 39 Cal. 24, 28.)

The court did not err in its instructions. (1 Freeman on Executions, p. 221, Sec. 101; *Gallick v. Bordeaux*, 22 Mont. 447; *Noble v. Holmes*, 5 Hill, 195; *Hootman v. Bray*, 3 Mont. 409; *Ford v. McMaster*, 6 Mont. 240; *Marcum v. Coleman*, 8 Mont. 196; *Palmer v. McMaster*, 10 Mont. 390; 1 Freeman on Executions, Secs. 155, 156; *O'Gara v. Lowry*, 5 Mont. 427, 436; *Dodge v. Jones*, 7 Mont. 121-146; *Cady v. Zimmerman*, 20 Mont. 225; 2 Rice on Evidence, p. 954; *Gaines v. White*, (S. Dak.) 47 N. W. 524; *Wilson v. Harris*, 21 Mont. 374, 415; 14 Am. and Eng. Ency. of Law, 2d Ed., p. 487; *Hinds v. Keith*, 57 Fed. 10; *Angell v. Packard*, 61 Mich. 561; *Rein v. Kendall*, 55 Neb. 583; *Casey v. Leggett*, 125 Cal. 664; *Williams v. Borgwardt*, 119 Cal. 80; *Jones v. Simpson*, 116 U. S. 609; *Ross v. Wellman*, 102 Cal. 1, 4; Civil Code, Secs. 4492, 4493; 2 Freeman on Executions, Sec. 270; *Briggs v. Gleason*, 29 Vt. 78; 1 Wade on Attachment, Sec. 239; *Barrett v. White*, 3 N. H. 210; *Campbell v. Johnson*, 11 Mass. 184; *Malcom v. Spoor*, 12 Metc. 279.)

Execution sales are held void when made to raise a greater sum than is authorized by the judgment. (Kleber on Void Judicial Sales, Sec. 336; 8 Ency. Pl. and Pr. pp. 428, 430; Freeman on Void Judicial Sales, Secs. 25, 34; *Dawson v. Litssey*, 10 Bush. 408; *Hastings v. Johnson*, 1 Nevada, 613; *Gathwright v. Hazard*, 10 B. Mon. 557; *Blakey v. Abert*, 1 Dana, 185; *Patterson v. Carneal*, 3 A. K. Marsh, 618.)

The character of the instrument being conceded to be a mortgage, a mortgagee in possession may defend his title just as any absolute owner may defend, and can not be deprived of it by levy of an execution or attachment; and if the officer succeeds in taking the property, the mortgagee may sue him for conversion and recover the value of the property, or the value

of his interest in the goods. After the mortgagee has taken possession by virtue of his mortgage, the mortgagor has no longer any interest in the property which can be seized upon execution; the property can not be taken from the mortgagee without there being first tendered to the mortgagee the amount of the mortgage debt. (*Jones on Chattel Mort.* Secs. 462, 557; *Wise v. Jefferis*, 51 Fed. 641; *Pike v. Corbin*, 67 Ill. 227; *Marsh v. Lawrence*, 4 Cow. 461; *Moore v. Murdock*, 26 Cal. 515; *Worthington v. Hanna*, 23 Mich. 530; *Becker v. Dunham*, 27 Minn. 32; *Palmer v. Forbis*, 23 Ill. 301.)

It is not error to refuse an instruction requested when the same is covered by an instruction given. (*Hayes v. Union Merc. Co.*, 27 Mont. 264.) In construing the charge, it must be taken together. (*Kennon v. Gilmer*, 5 Mont. 257.) When an instruction, standing alone, is erroneous, but when, in connection with other instructions, the law is correctly stated, the error is harmless. (*Fitschen v. Thomas*, 9 Mont. 52.)

Defendants cannot now raise the point, that the verdict is not supported by the evidence, for the first time in the supreme court. (*Campbell v. Great Falls*, 27 Mont. 37; *Chas. Schatzlein Paint Co. v. Passmore*, 26 Mont. 500.)

MR. JUSTICE HOLLOWAY delivered the opinion of the court.

This is an action in claim and delivery, brought by Emanuel Gallick against Thomas J. Bordeaux, a constable of Silver Bow county, and John R. Bordeaux and A. H. Barrett, the sureties on the official bond of such constable.

The complaint alleges that on May 15, 1895, the plaintiff was the owner and entitled to the possession of a certain stock of goods consisting of wines, liquors, cigars, tobaccos, etc., contained in a certain saloon in Butte; that on that day the defendant Thomas J. Bordeaux, a constable, unlawfully seized and took possession of the goods above mentioned under a writ of execution issued from a justice of the peace court in an action



wherein one Cooney had obtained a judgment against one Bordoni; that the constable seized the goods above mentioned as the goods of Bordoni, and not otherwise. The value of the goods seized is alleged to have been \$868.02, and the prayer of the complaint is for the return of the goods, or for \$868.02, their value, and for \$1,000 damages for their wrongful seizure and detention. The complaint also contains this averment: "Plaintiff further alleges that the taking and detention of the said goods and chattels hereinabove mentioned by the said defendant Thomas J. Bordeaux was a breach of his official duty, and also a breach of his official bond."

The answer denies the ownership or right of possession of the plaintiff, Gallick; denies the value of the goods to have been \$868.02, or any greater amount than \$176; admits the taking of the goods by the defendant Thomas J. Bordeaux, but alleges that the goods were the property of F. A. Bordoni, the judgment debtor mentioned; alleges the recovery of the judgment upon which execution was issued, the issuance of execution and seizure of the property thereunder; and alleges that at the time of said seizure Bordoni was in actual possession of the goods.

The reply denies that Bordoni was in possession of the goods, except as the agent and employe of plaintiff, and denies the rendition of the judgment in Cooney against Bordoni.

The cause was tried to a jury, which returned a verdict in favor of the plaintiff for the return of the goods, or for the sum of \$400, their value. A judgment in accordance with this verdict was rendered, from which judgment and an order denying a motion for a new trial the defendant appealed.

Upon the trial evidence was offered on behalf of the plaintiff which tended to show that on or about the 2d day of May, 1895, the plaintiff had purchased the goods in controversy from Bordoni; that plaintiff had taken immediate possession, had placed a sign over the front door, "E. Gallick, Proprietor," and also a like sign in a show case inside the building; that he caused an inventory to be taken of the property, and had then employed

Bordoni as his agent to conduct the business for him. The inventory of the property showed that it was of the value of \$868.02. On behalf of the defendants evidence was introduced which tended to show that no transfer from Bordoni to Gallick had been made, or, if made at all, that it was not *bona fide*, but made for the purpose of protecting Bordoni. The evidence further tended to show that Bordoni had been in the active management of the business, had employed a bartender, and had purchased goods for the place subsequent to the 2d day of May, the date of the alleged sale. It was also sought to be shown that the stock of goods was of the value of about \$176. This cause was heretofore before this court in *Gallick v. Bordeaux*, 22 Mont. 470, 56 Pac. 961.

On the trial the court, at the instance of the plaintiff, gave to the jury a number of instructions, to which objections are here made.

1. Instructions 4 and 6. The opening sentence of instruction No. 4 is as follows: "The jury are further instructed that the fact that the said Bordoni was in the employ of the plaintiff, and in the saloon at the time this property in controversy was seized by the defendant," etc. Instruction No. 6 contains this expression: "The fact that the said plaintiff employed the said Bordoni as an employe about said place and placed him in charge thereof of itself raises no presumption of bad faith on the part of said plaintiff."

In each of these instructions the existence of a particular fact is assumed, viz., that the plaintiff had employed Bordoni in and about the place where the property in controversy was found by the constable when he seized it. This assumption made by the court, under the record here presented, was equivalent to telling the jury that Bordoni had sold this property to the plaintiff, and that plaintiff had employed him to care for it. These were facts in dispute. Evidence was offered by defendants to show that Bordoni had never sold the property at all, but was the owner himself at the time of the seizure, and therefore his

work in the saloon was work done for himself, and not as the employe of plaintiff or any one else.

It is the duty of the court to instruct the jury with reference to all matters of law which the court may deem necessary for the formation and rendition of a verdict. (Section 1080, Code of Civil Procedure, as amended by act of the Fifth Legislative Assembly, approved March 1, 1897, (Laws 1897, p. 241.)

The jury are the judges of the effect or value of the evidence. (Section 3390, Code of Civil Procedure.) In other words, the facts are to be found by the jury from the evidence, and it is error for the court in its charge to assume as proven a fact which is in issue. (*Palmer v. McMaster*, 10 Mont. 390, 25 Pac. 1056; *Harrington v. Butte & Boston Mining Co.*, 19 Mont. 411, 48 Pac. 758; *Collier v. Fitzpatrick*, 19 Mont. 562, 48 Pac. 1103; *Butte & Boston Mining Co. v. Societe, etc. Lexington*, 23 Mont. 177, 58 Pac. 111, 75 Am. St. Rep. 505; *Lawrence v. Westlake*, 28 Mont. 503, 73 Pac. 119.)

2. Instructions 3 and 13. By instruction No. 3 the court told the jury "that, before an officer can justify under an execution issued out of a justice court, it *must* appear that the justice court issuing said execution had jurisdiction of the parties and the subject-matter; that the judgment was legally and regularly made and entered; and that the execution was in due and legal form." Instruction No. 13 is as follows: "The jury are further instructed that the defendant Thomas J. Bordeaux occupies in this case the position of one who claims the property not as owner, but by virtue of a special interest therein as an officer under his writ, and for the purpose indicated therein; that it is only by reason of his special interest as such officer acting under a writ that he can be permitted to contest the right of the plaintiff. So far as the defendant officer is concerned, except for his writ and the rights acquired by his seizure thereunder, he has no right or authority to question the arrangement between the plaintiff and Bordoni, and the same is valid and binding as to all persons whatsoever except as to an officer acting under and by virtue of a valid writ. If, therefore, the jury

believe from the evidence that the said defendant Bordeaux was not acting under a valid writ of execution, or that the court issuing the same had no jurisdiction to issue the writ, or that the said officer abused the process of the court, after seizing the said goods, by permitting the same to be wasted or destroyed, then in either of these events the said writ furnished the officer is no justification for the seizure, and your verdict should be for the plaintiff."

In instruction No. 3, above, the court told the jury that it must appear that the justice issuing the execution had jurisdiction of the parties to the action and of the subject-matter, that the judgment was legally and regularly made and entered, and that the execution was in due and legal form. The reading of this at once suggests the inquiry, to whom must it be made to appear? To the jury? It is hardly conceivable that such questions would be submitted to a jury. But when instruction No. 13, above, is read in connection with this, it is quite apparent that the inquiries contained in instruction No. 3 were directed to the jury, for in No. 13 the question of the validity of the execution under which the defendant Bordeaux assumed to seize and hold this property, as well as the question of the jurisdiction of the court issuing the writ, are directly submitted for determination to the jury.

The three questions above submitted in instruction No. 3 and the two suggested above in No. 13 are questions of law, with which the jury did not and could not have had anything whatever to do. They are questions which the court should have determined, and, if determined adversely to defendant, an instruction plainly telling the jury that the defense sought to be made had failed should have been given. The jury ought not to have submitted to it questions respecting which it knew nothing, and which were entirely without its province to determine. It is the province of the court to tell the jury what the law of the particular case is, not to ask the opinion or advice of the jury respecting it.

3. Instruction No. 8. "The jury are further instructed that the defendant Thomas J. Bordeaux attacks the sale to the plaintiff upon the ground that it was made with intent to delay or defraud the creditors of said Bordoni in the collection of their debts, and particularly one J. H. Cooney. The jury are instructed that this is an affirmative defense, and, in order to sustain the allegations of their answer, defendants must establish to the satisfaction of the jury by a preponderance of the evidence that the said sale from Bordoni to the plaintiff was made with intent to delay or defraud the creditors of said Bordoni; and unless you find as a fact from the evidence that the said transfer and sale from Bordoni to plaintiff was made with the intent to delay or defraud said creditors in the collection of their debts, then your verdict should be for the plaintiff."

The plaintiff, in his complaint, claims that he was the owner of the goods at the time of their seizure and subsequently. The answer puts this in issue by a denial of such allegations, and alleges that Bordoni was such owner. The burden throughout was upon plaintiff to prove his ownership or right of possession. The defendants might rely upon his failure to make such proof, or, if he attempted to prove his ownership by showing a purchase from Bordoni, they might under a general denial of such ownership, show that such sale was void. (*Reynolds v. Fitzpatrick*, 28 Mont. 170, 72 Pac. 510.)

If plaintiff relies for his title upon a sale from Bordoni, he must show a valid sale. The burden is not upon defendants to show that it is invalid. If the answer had admitted the sale, and had sought to avoid its effect by alleging fraud in its inception, the instruction in this respect would have stated the law, but no such allegations were made by defendants, and the instruction is therefore not only inapplicable, but erroneous. The expressions of this court made in this case on the former appeal (*Gallick v. Bordeaux*, above) ought to have been sufficient to have avoided this error.

In *Kipp v. Silverman*, 25 Mont. 296, 64 Pac. 884, this court had before it a very similar case—of conversion, however, in-

stead of claim and delivery. The sheriff had seized certain goods as the property of Hamilton under an attachment issued in an action brought by Silverman & Cohen against Hamilton, and afterwards sold them under execution. Thereupon Kipp brought an action for damages for the conversion of the goods. The defendants answered, denying ownership in Kipp, alleging ownership in Hamilton, and justifying under the attachment and execution. On the trial the court gave instructions on the subject of the burden of proof, the first of which told the jury, that the burden was upon the plaintiff to show that at the time alleged he was the owner and entitled to the possession of the goods, that the defendant sheriff wrongfully seized and sold the property, and that such property was of a value greater than the value admitted by the defendants. The second was to the effect that the burden of proof was upon defendants to show that at the time of the levy upon and sale of the property such property was owned by Hamilton, the judgment debtor. Respecting these instructions this court said: "The first of these instructions is a correct statement of the law upon the issues involved in the case, which are the ownership of the property and its value. In cases of this character the plaintiff must recover, if at all, upon the strength of his own title, and not upon the weakness of that of his adversary. Therefore the obligation rests upon him to sustain this burden by a preponderance of the evidence; that is, he must show, by a preponderance of the evidence, that he has a right superior to that of the defendant, and that the value of the property or the interest therein in question is greater than that admitted by the defendant. Hamilton being apparently in the exclusive possession, and therefore *prima facie* the owner at the time the levy was made, the endeavor on the part of the defendants to show title in him was but one mode of meeting and rebutting plaintiff's claim, and after presenting their evidence they would be entitled to a verdict if the whole of the evidence upon this issue did not show a preponderance in plaintiff's favor. (*Finch v. Kent*, 24 Mont. 268, 61 Pac. 653.) The defendants were not under obligation

to produce any evidence until plaintiff had made out a *prima facie* case, and then to go no further than to produce sufficient evidence to show an equipoise. The burden, therefore, rested upon the plaintiff throughout. There are elementary principles, applicable to all cases where there is an issue as to title, whether the defendant asserts title in himself or in a third person. The second paragraph quoted is not only in direct conflict with the first, but is wrong in principle. By it the jury were told, in substance, that, unless the defendants could show title in Hamilton by a preponderance of the evidence, the plaintiff must prevail."

Except as to the character of the action the facts in this case are so nearly alike those in the case at bar that the language of the court above appears peculiarly applicable here, disposes of this feature of the case, and serves to emphasize the error of the court in giving instruction No. 8. Furthermore, instruction No. 8 is directly in conflict with instructions Nos. 6 and 7, given at the instance of the defendants.

4. Instruction No. 10. By instruction No. 10 the court told the jury that if they believed from the evidence that the constable, at the time he seized the property in controversy, was notified of the claim of ownership on the part of the plaintiff, but, notwithstanding such notice, took the property into his possession, then the constable would not be justified in making such seizure, unless the jury should find that the transfer from Bordoni to the plaintiff was made with intent to delay or defraud the creditors of Bordoni; and concludes with this expression, "And unless you so find, your verdict should be for the plaintiff."

It is quite impossible to determine whether the notice herein mentioned has reference to a third party claim of ownership or not. If this plaintiff, Gallick, desired to have the property released from seizure, Section 1220 of the Code of Civil Procedure provides the method of procedure; but, even in case he asserted such right, the constable would not be compelled to deliver possession to him if the execution plaintiff furnished

an indemnity bond. In addition to this uncertainty, the instruction is erroneous in directing a verdict for the plaintiff upon a mere claim of ownership asserted at the time of the seizure of the property by the constable (if this is what the instruction implies), unless the jury should find that the transfer from Bordoni to plaintiff was made with intent to delay or defraud creditors. It was incumbent upon plaintiff to prove to the satisfaction of the jury by a preponderance of the evidence that at the time of the commencement of this action he was the owner or entitled to the possession of the property in controversy, and unless he made such proof he could not recover, even though defendants might wholly fail to show any defect in the alleged transfer from Bordoni to plaintiff. It will not do to say that mere notice to the constable of Gallick's claim of ownership shall be sufficient to shift the burden of proof as to the *bona fides* of the transfer from Bordoni to Gallick upon the defendants. As said heretofore, if Gallick based his claim of ownership to the property upon a purchase from Bordoni, he must show a valid purchase. The burden is not upon defendants to show that it was invalid.

5. Instructions 11 and 17. Instruction No. 11, in substance, told the jury that, if they found from the evidence that the defendant Thomas J. Bordeaux seized the property under an execution, and while he held the goods in his possession he and his employees destroyed and used the goods, by reason whereof they were deteriorated in value, then the jury should find that such constable was a trespasser from the beginning, and that his process furnished him no justification for his acts; and concludes as follows: "And if you find from the evidence that there was such abuse of process by said defendant, then your verdict should be for the plaintiff."

Instruction No. 17 in effect told the jury that if they believed from the evidence that the execution under which the defendant Thomas J. Bordeaux sought to justify his seizure of the property was issued for an amount materially greater than the amount actually due upon the judgment, then such execu-



tion was void, and furnished no justification to the defendant for the seizure of the property, and the verdict of the jury should be for the plaintiff.

In each of these instructions the jury were told plainly that, if they found some defect (particularly pointed out in each) in the attempted justification of the defendants, then their verdict should be for the plaintiff.

A portion of the language of this court in *Kipp v. Silverman*, quoted above, is likewise pertinent here. Under these instructions the jury should have found for plaintiff if they found any of the enumerated defects in defendants' attempted justification, whether plaintiff had shown any title or right of possession in himself or not. In this action, as well as in conversion, the plaintiff must recover upon the strength of his own title, and not upon the weakness of his adversaries'; and because these instructions ignore this doctrine they are erroneous.

6. Instruction No. 18: "The court further instructs the jury that if you believe from the evidence that F. A. Bordoni transferred and assigned to the plaintiff the property in controversy in this suit as security for the money advanced by plaintiff or by E. Gallick for said Bordoni, and that the said plaintiff took immediate possession of the said property, and retained the same either personally or through Bordoni as his employe, then you are instructed that the defendant Thomas J. Bordeaux could not seize and take into his possession the said property in controversy without paying to the said plaintiff or tendering to him the amount for which the said property was held by said plaintiff as security, and the failure of said defendant to tender the amount due to said plaintiff or to said E. Gallick for which the said property was security rendered the said defendant liable to the plaintiff for the whole value of the said property, or the amount of the indebtedness for which the same was given as security, and your verdict should be for the plaintiff for the full value of the property *and* the amount of said indebtedness, with interest thereon from the 15th day of May, 1895, to date."

Waiving the question as to whether this instruction does not entirely change the theory upon which plaintiff had tried the case—that is, presenting plaintiff as a mortgagee instead of an absolute owner of the goods—it is to be observed that it announces a wholly fallacious standard as a measure of plaintiff's recovery.

If plaintiff was seeking to recover as mortgagee, the measure of his damages in case return of the goods themselves could not be had would be the value of the goods up to the amount of the indebtedness, with accrued interest (*Harrington v. Stromberg-Mullins Co.*, 29 Mont. 157, 74 Pac. 413); but under no theory of the case could plaintiff recover the full value of the property and the amount of the indebtedness, with interest, as announced in the closing sentence of this instruction.

7. Defendants' instruction No. 13. The defendants asked the court to give an instruction designated defendants' instruction numbered 13, as follows: "The court instructs the jury that, unless the jury find the fact to be that there was an actual and continued change of possession of the property alleged to have been sold by Bordoni to the plaintiff herein, then the jury must find for the defendants in this action."

This feature of the case had been properly covered by instructions 8 and 9 given at the instance of defendants, and no error could have been predicated on the court's refusal of the instruction altogether; but, instead of refusing it, the court struck out the words "and continued," as used to characterize the possession following the sale, and as thus modified the instruction was given. A correct statement of the law was thus rendered erroneous, and the instruction made to conflict directly with instructions 8 and 9 given at the instance of the defendants.

8. As to the parties defendant. This action is brought against the constable and the sureties on his official bond. The action is in claim and delivery, and no pretense is made in the pleadings that the defendants Barrett and John R. Bordeaux, or either of them, were ever concerned in any manner whatever

with the seizure or detention of the property in controversy. Apparently liability is sought to be fastened upon them merely by virtue of the fact that they are such sureties. The gist of the action is the ownership or right of possession in the plaintiff and the wrongful seizure and detention by defendants, and the primary relief sought is the return of the property in specie. In order that the complaint state a cause of action, it must not only allege ownership or right of possession in the plaintiff, but it must allege the wrongful seizure and detention of it by the defendants. The action lies only against the party in possession. (18 Ency. Pleading and Practice, 509.) Tested by these rules, as to the defendants Barrett and John R. Bordeaux the complaint states no cause of action.

Certain of the instructions are also open to criticism other than that made upon them, but these features are all fully covered in disposing of the numerous questions involved, and the views of this court as expressed upon the former appeal, taken in connection with the observations herein contained, will be sufficient to direct the trial of this cause in the court below.

The judgment and order are reversed, and the cause is remanded, with directions to grant defendants a new trial, and to take such further action as may not be inconsistent with the views herein expressed.

MR. CHIEF JUSTICE BRANTLY and MR. JUSTICE MILBURN  
concur.

*Reversed and remanded.*

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DUANE, APPELLANT, v. MOLINAK, RESPONDENT.

(No. 1,959.)

(Submitted October 18, 1904. Decided December 1, 1904.)

*Vendor and Purchaser—Statute of Frauds—Action for Price—  
Police Courts—Appeal—Pleading—Verdict—Judgment.*

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1. Under Code of Civil Procedure, Section 1528, the filing of an amendment to defendant's answer pleading the statute of frauds to an action to recover the price of certain land sold did not require a replication.
2. The pleadings in the district court on an appeal from a justice or police court are governed by the same rules as pertain to pleadings in such courts.
3. The district court, sitting to hear appeals from the court of a justice of the peace or police court, must try the case *de novo*, and exercise only the same jurisdiction as was exercised by the court appealed from.
4. Where, in an action to recover a balance on a contract for the purchase of land, defendant answered, denying the allegations of the complaint, and alleging damages on account of certain misrepresentations as a counterclaim, such answer was not superseded by an amendment subsequently filed by defendant, after an appeal had been taken from the police court to the district court, pleading the statute of frauds as an affirmative defense.
5. Where an action was brought in the police court to recover a balance due on a sale of land, and defendant answered, denying the allegations of the complaint, and alleging as a counterclaim damages arising from certain misrepresentations of plaintiff, and on appeal from the police court pleaded the statute of frauds by amendment, such pleadings raised issues of fact to be tried in the ordinary manner, and it was therefore error for the court to render judgment for defendant on the pleadings.
6. Where a verdict as directed by the court and returned was for the defendant for costs, the court had no power to render judgment in favor of defendant for costs, and for damages claimed in an untried counterclaim.

*Appeal from District Court, Deer Lodge County; Welling Napton, Judge.*

ACTION by Pat Duane against John Molinak. A judgment was rendered in favor of defendant on appeal from a justice's judgment in favor of plaintiff, and the latter appeals. Reversed.

*Mr. J. H. Tolan*, for Appellant.

*Mr. John W. James*, for Respondent.

MR. COMMISSIONER CLAYBERG prepared for the court the following opinion:

Appeal from a judgment. The complaint was filed in the police court of Anaconda to recover an unpaid balance due upon a contract for purchase and sale of land. Defendant answered, denying the allegations of the complaint, and alleging by way of counterclaim facts in support of damages to the amount of \$300 for certain misrepresentations of plaintiff in the contract

of sale. The action was tried, and resulted in a judgment in favor of plaintiff for the amount claimed in his complaint. From this judgment defendant appealed to the district court. After such appeal was perfected, defendant filed an amendment to his answer, pleading as an affirmative defense the statute of frauds. No replication was filed to this amendment, and none was required (Section 1528, Code of Civil Procedure), the pleadings in the district court upon an appeal from a justice or police court being governed by the same rules as to pleadings in these courts.

After the jury was called and sworn to try the case in the district court, the defendant moved for judgment on the pleadings, and that the jury be instructed to render a verdict for defendant for his costs, which motion was by the court granted, and a verdict rendered for defendant for his costs as directed. A judgment was thereupon entered in favor of defendant for his costs and the sum of \$300 damages as claimed in the counterclaim alleged in his answer in the police court. Plaintiff appeals from this judgment.

A reversal must follow. The district court sitting to hear appeals from a justice's or police court must try the case so appealed *de novo*, and exercise only the same jurisdiction as was exercised by the justice's or police court. (*State ex rel. Grisom v. Justice Court of Twp. No. 1*, 31 Mont. —, 78 Pac. 498; *Clark v. Great Northern Ry. Co.*, 30 Mont. 458, 76 Pac. 1003; *State ex rel. Shanahan v. Lindsay*, 22 Mont. 398, 56 Pac. 827; *State v. Deslauries*, 13 Mont. 398, 34 Pac. 490; *Missoula Electric Light Co. v. Morgan*, 13 Mont. 394, 34 Pac. 488.)

The record does not disclose that any other issues than those of fact arising on the pleadings were tried in the police court. A further and additional issue of fact was presented to the district court upon the amendment which was filed to the answer of defendant, but the issues joined by the answer filed in the police court remained to be disposed of as they were made up in that court. The original answer was not superseded by the amendment, but still remained, and presented issues of fact to

be determined by the district court. With these issues remaining, the court could neither grant a judgment on the pleadings nor direct a verdict for defendant. (*Horsky v. Moran*, 13 Mont. 250, 34 Pac. 360; *Floyd v. Johnson*, 17 Mont. 469, 43 Pac. 631; *Bach, Cory & Co. v. Mont. L. & P. Co.*, 15 Mont. 345, 39 Pac. 291; *Swinehart v. Pocatello Meat & Produce Co.*, (Idaho) 70 Pac. 1054.)

But again, the verdict as directed by the court and returned was for the defendant for his costs. Notwithstanding this verdict, judgment was entered in favor of defendant for his costs and for \$300 damages. So we have the anomaly of a verdict for defendant for costs and a judgment for costs and \$300 damages.

We advise that the judgment appealed from be reversed.

PER CURIAM.—For the reasons stated in the foregoing opinion, the judgment is reversed, and the cause remanded.

*Reversed and remanded.*

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STORY ET AL., PLAINTIFFS AND RESPONDENTS, v. WOOLVERTON ET AL., DEFENDANTS AND RESPONDENTS;  
ANGIE REYNOLDS, INTERVENER AND RESPONDENT; THE STATE OF MONTANA, INTERVENER AND APPELLANT.

(No. 1,995.)

(Submitted September 26, 1904. Decided December 1, 1904.)

*Public Lands—Grant by U. S. Government to State—Construction of Grant—Right to the Use of Water.*

1. A grant of public land must be construed in favor of the grantor.

2. The Act of Congress of February 13, 1891 (26 Statutes at Large, 748), granting to the state of Montana one section of land of an abandoned military reservation to be selected "so as to embrace the buildings and improvements thereon, to be used by the said state as a permanent militia camp ground," did not grant any right to the use of water which the government had diverted from a stream and used upon the land granted for domestic and irrigation purposes necessary to a military encampment.

*Appeal from District Court, Gallatin County; W. R. C. Stewart, Judge.*

ACTION by T. B. Story and others against W. W. Woolverton and others, and Angie Reynolds and the state intervened. From a judgment against the state as intervener, it appeals. Affirmed.

*Mr. James Donovan, Attorney General, for the State.*

The position of the appellant and intervener is that on February 5, 1868, the president of the United States had the right, and did, set aside certain lands for the purpose of the Fort Ellis military reservation; that as soon as the lands so set aside were occupied by the military forces, the military forces began the construction of buildings, and the use of water for the conveniences of the post; that from the particular stream from which it took its water, Bear Creek, the government of the United States had yielded no prior claim or right to any of these waters; that the waters were necessary for military, domestic and agricultural purposes at the fort, and were so used by the government up to the time the land was conveyed to the state of Montana; that the paramount idea in the Act of 1891, February 13, was to grant to the state of Montana a portion of said military reservation for the purpose of a camp ground for the state militia; that the land was so conveyed for that particular use, and the particular piece of land that was conveyed was the land upon which the buildings were situated, so that the state might have a permanent place for a state militia camp ground; in this grant it conveyed everything that was essential to carry out the purposes of the grant; the water was necessary and essential to perfect the purposes of the grant, and while the law

does not expressly provide the conveyance of water, yet the grant itself carries with the land and buildings the water, just as much as it carries anything connected with the camp ground, and the grant carried with it sufficient water to put the ground in such shape that the intent and purpose of the grant should be fulfilled to the highest degree. It would be rather novel to say that the federal government made a grant of land to the state of Montana for the purposes of a military camp ground, and in such a grant by its silence in reference to the water, excluded the water, which exclusion would amount to putting the grant in such condition as to defeat the intent and purposes of the grant. Such cannot be a fair construction of this grant. (*Smith v. Denniff*, 24 Mont. 20; *Cave v. Crafts*, 53 Cal. 140; *Philbrick v. Ewing*, 97 Mass. 134; Black's *Pomeroy on Water Rights*, p. 98.)

It is never contemplated in any federal, state or individual endowment, or gift, or conveyance, to make an endowment, grant, gift or conveyance, and then defeat the gift, grant, endowment or conveyance by withholding essentials and inseparable incidents or appurtenances of the gift, donation, conveyance or grant, which by such withholding would make the gift, conveyance, grant or endowment worthless or invaluable. If the question resolves itself into whether or not certain things are intended in a grant to go with a grant, the inquiry always is, where the act does not express and directly mention all the essentials, that the essentials go with it; otherwise the grant would be invaluable. It is only when there is an express exclusion of a beneficial appurtenance or incident in the grant that it can be said that the incident or appurtenance is excluded from the grant. It would be a strange construction of the Act of Congress of February 13, 1891, to say that the federal government conveyed to the state of Montana 640 acres of ground for a military camp ground, or to be used for other public purposes, but that it excluded from the grant the use of any water that was previously used upon the ground, or that it did not convey the water by such grant but returned the water to the



public so that it could be appropriated as against the state and the usefulness of the grant destroyed.

The correct construction of said grant to the state of Montana is this: The federal government conveyed to the state of Montana 640 acres of ground to be selected by the agent of the state, and the use of everything was conveyed that was made use of by the federal government while it occupied the land that was granted, so long as the things that the government used were essential to the uses and purposes of the grant. This interpretation is reinforced by the language of the act itself, because in making the grant the federal government did not convey the land to the state of Montana because of the value of the land from a monetary point of view, or to add to the wealth of the land grants of the state, or to increase the treasury of the state of Montana, but for the express and limited purpose of a camp ground and for public purposes, reserving the right in congress to cancel the grant at any time when the purposes for which the grant was made were not being carried out. The purposes for which the grant was made cannot be carried out if the grant did not convey the water with the land. Suppose this was done, could it be then said that if the federal government forfeited the grant and desired to use the granted lands for federal military post again that the water that was essential to the maintenance of a military post upon this one section was lost to the federal government, and that it could not assert a right to the water?

The state of Montana having accepted the terms of the grant, became vested with the title conveyed by said grant, and the state of Montana, having taken immediate possession, made its selection and occupied and used said grant as the terms of the grant directed, is entitled to the exclusive and peaceable possession of the land and sufficient water from Bear creek to make useful the land as the federal government intended it should be used. The federal government, being the owner of the water and the land, used the same from 1868 down to February 13, 1891, and had an uninterrupted use of the water until all that portion of the military reservation other than section 15 and

forty acres in section 10 was thrown open to settlement and surveyed. The state of Montana took possession February 13, 1891, or immediately thereafter, and has, up to the present time, continued to occupy section 15 and forty acres in section 10, which it selected under the grant and has used the land for the purposes mentioned in the grant and the water to carry out the purposes of the grant. For thirty-six years the waters of Bear creek have been used by the federal and state governments for public purposes as a branch of the federal and state governments. There has been no period of time since February 15, 1868, to the present time when the federal government relinquished any portion of the water that was essential for military purposes at Fort Ellis, and there is no period of time from February 13, 1891, to the present when the state has failed to use the water for the purposes of the grant. There has been an unbroken and uninterrupted possession in the federal and state governments to the waters of Bear creek for thirty-six years, against which no claim could be asserted by any private individual.

The essential elements of a right of "appropriation" are a prior, continued and beneficial use of water. It is rights to the use of water which by "priority of possession" have become vested under local customs and laws that are acknowledged and confirmed by the act of 1866. That act does not waive any right of the government to exercise the privileges of using the water of any stream which it may subject to a beneficial use. So long as the water of a stream is used by the government, or its successor in interest, no "priority of possession" thereof could be obtained by an individual, and, consequently, no right could be initiated so as to be entitled to recognition under said act.

To be entitled to initiate a right of appropriation it is necessary only that the appropriator be in the possession of riparian land or of land to which he has a right of way for the necessary ditch from the stream. (*Smith v. Denniff*, 24 Mont. 20.)

There is no express restriction of the privilege of appropriation to individuals to the exclusion of the government or any other body politic; and it is insisted that, from the nature of the

right, none could fairly be implied. (*Krall v. United States*, 24 C. C. A. 543, 79 Fed. 241, 48 U. S. App. 351.)

In the case of *Smith v. Denniff*, *supra*, this court, in an opinion by Mr. Justice Pigott, after making an exhaustive examination of the subject, concludes that where an owner of land acquires by appropriation or purchase a water right and uses the same on his land, the title to the water right, which he shows is appurtenant to the land, passes under a grant of the land unless expressly reserved in the deed.

The complaint in intervention of the state of Montana alleges the continuous use by the government on the Fort Ellis reservation of the water appropriated by it in 1870 up to the time of the grant to the state of Montana. The right to its use was, therefore, appurtenant to the land, and, not being reserved from the grant, passed by it to the state of Montana.

So long as the state of Montana remains in the possession of the Fort Ellis reservation under its grant, it therefore will be in the position to enjoy all the rights of a tenant *in fee simple*. The effect of the qualifications attached to the grant, that said reservation shall be used as a militia camp ground or for such other uses as may be prescribed by the legislature, is that if such uses shall at any time cease, the government will be in a position to assert its reversionary right. Manifestly, however, these qualifications do no more than define what shall entitle the United States to assert its right of reversion, and do not constitute, so far as third persons are concerned, any limitation or restriction upon the use which may be made by the state of the Fort Ellis reservation. So far as the respondents in this case are concerned, it is immaterial what use the state is making of this land, so long as the United States does not interfere. (*Bybee v. Oregon & Cal. R. R. Co.*, 139 U. S. 675; *Schulenberg v. Harriman*, 21 Wall. 44; *Van Wyck v. Kneavals*, 106 U. S. 360.)

Mr. John A. Luce, for Respondents Story et al.

Messrs. Hartman & Hartman, for Respondents Woolverton, Reynolds et al.

MR. COMMISSIONER CALLAWAY prepared the following opinion for the court:

The plaintiffs and defendants were trying their respective titles to the waters of Bear creek, in Gallatin county, when the state of Montana, through the attorney general, intervened. Upon the trial, plaintiffs and defendants objected to the introduction of any evidence in support of the intervener's complaint, on several grounds. The court sustained the objection, and entered judgment against the intervener, from which it has appealed.

It appears from the record that by an executive order of the president of the United States there was created on February 15, 1868, the military reservation of Fort Ellis, situated in Gallatin county, state of Montana; that said military reservation was created for the purpose of stationing soldiers of the United States government there; that it consisted of a large number of acres of land, and that a plat thereof was made, and its boundaries clearly defined; that the United States continued to use and occupy the same until July 26, 1886, when it was abandoned; that it became necessary to supply the reservation with water for domestic and irrigation purposes, and that the government, through its officer in charge, constructed a ditch sufficient to carry something over 200 inches of water from Bear Creek canyon to section 15, where the buildings on said reservation were situated, and where the intervener alleges the water was used for domestic purposes, and for the purpose of irrigating plats for gardens, and the raising of hay and other crops. The intervener further alleges that the government of the United States continued to use said water, and had its ditches and flumes in such condition that they would carry more than 200 inches of water onto said section 15, and continued to use said water from the time of its diversion up to the time the military reservation was abandoned in 1886. The record does not show that the water was not used on other portions of the reservation besides upon section 15.

On February 13, 1891, congress passed an Act to provide for the disposal of the abandoned Fort Ellis military reservation, in Montana, under the homestead law, and for other purposes. (26 Stat. 747.) The first section of the Act authorized the secretary of the interior to cause the land embraced in the reservation to be surveyed. The second section reads as follows: "That there is hereby granted to the state of Montana one section of said reservation to be selected according to legal subdivisions so as to embrace the buildings and improvements thereon, to be used by the said state as a permanent militia camp ground, or for other public purpose in the discretion of the state legislature; provided that whenever the state shall cease to use said lands for public purposes the same shall revert to the United States." Pursuant to this provision the state of Montana selected the ground upon which the buildings were situated, which included all of section 15, except 40 acres, and in lieu of this 40 selected 40 in the adjoining section 10.

It is contended by the attorney general that congress granted to the state the ditch from Bear creek, together with the right to use 200 inches of the waters of said creek. Is the language employed in the foregoing section comprehensive enough to include a water right and ditch, as a part of the improvements upon said section? It seems that both the plaintiffs and defendants, or some of them, own a portion of the land which was formerly a part of the military reservation, and they claim their water rights from Bear creek. Prior to the time of settlement upon the lands in question, and prior to the appropriation of the waters of Bear creek by any one, both the land and the water were the property of the government. When the government established the reservation, it owned both the land included therein, and all the water running in the various near-by streams to which it had not yielded title. It was therefore unnecessary for the government to "appropriate" the water. It owned it already. All it had to do was to take it and use it. When the government abandoned the military reservation, it also must have abandoned the use of the water thereon, which was again

allowed to flow in its regular channel as a part of the public domain, subject to the appropriation of any one who sought to take it.

It appears affirmatively from the complaint in intervention that the government abandoned the reservation in 1886, and that it took no steps to dispose of it until the Act of February 13, 1891, was passed. The Act provides, as will be noticed, that the state is to select a section of land so as to embrace the buildings and improvements thereon. The word "embrace," in the sense used, means "to inclose, as by surrounding or encircling; hence to take in; comprehend." (Standard Dictionary.) The meaning of the section is made certain by the use of the word "thereon." The rule is that if the language of a statute is plain and unambiguous, and expresses a single, definite and sensible meaning, it must be interpreted literally. (Black on the Interpretation of Laws, Sec. 26.) The language used is "the buildings and improvements thereon."

While the general rule is that the description in private grants is construed in favor of the grantee, the reverse is the rule with regard to public grants. This is upon the theory that the government is a trustee for the public, and therefore the language of a grant by the government is construed in favor of the grantor; i. e., the people. As said in *Newton v. Commissioners*, 100 U. S. 548, 25 L. Ed. 710: "No grant can be raised by mere inference or presumption, and the right granted must be clearly defined. *Charles River Bridge v. Warren Bridge*, 11 Pet. 420, 9 L. Ed. 773, 938." In speaking of a grant of public land, the court, in *Dubuque & Pacific R. Co. v. Litchfield*, 23 How. 66, 16 L. Ed. 500, said: "All grants of this description are strictly construed *against* the grantees. Nothing passes but what is conveyed in clear and explicit language." And in *Hannibal & St. Joseph R. Co. v. Missouri River Packet Co.*, 125 U. S. 260, 8 Sup. Ct. 874, 31 L. Ed. 731, the court said: "But if there be any doubt as to the proper construction of this statute—and we think there is none—then that construction must be adopted which is most advantageous to the inter-

ests of the government. The statute, being a grant of a privilege, must be construed most strongly in favor of the grantor. *Gildart v. Gladstone*, 12 East. 668, 675; *Charles River Bridge v. Warren Bridge*, 11 Pet. 420, 544, 9 L. Ed. 773, 938; *Dubuque & Pacific Railroad v. Litchfield*, 23 How. 66, 16 L. Ed. 500; *The Binghamton Bridge*, 3 Wall. 51, 75, 18 L. Ed. 137; *Rice v. Railroad Co.*, 1 Black, 358, 380, 17 L. Ed. 147; *Leavenworth, Lawrence & Galveston Railroad v. United States*, 92 U. S. 733, 23 L. Ed. 634; *Fertilizing Co. v. Hyde Park*, 97 U. S. 659, 24 L. Ed. 1036."

The question at once arises, if the water right was appurtenant to the reservation, was it appurtenant to the whole, or simply to that portion of it which the state of Montana selected? The question cannot be answered from the record. The only inference is that the government, when it abandoned the reservation, intended that the water should continue to flow in its natural channel, and to be subject to appropriation by any one who should take it and use it for beneficial purposes, possibly upon land included within the reservation. Had the government desired so to do, it could have granted the right to the use of the water in express terms, but this it did not do. Furthermore, it appears from the complaint in intervention that the ditch whereby the water was conveyed extends for a long distance beyond the confines of section 15 to the point where it taps Bear creek. Can it be said that the grant conveyed that portion of the ditch which is not upon section 15, when the language of the grant is the "improvements thereon"?

Following out the rule that public grants must be construed in favor of the grantor, there can be no question but that the government did not grant to the state of Montana anything but that which is expressly mentioned, and therefore did not attempt to grant any right to the use of the waters of Bear creek.

It follows that the judgment should be affirmed.

PER CURIAM.—For the reasons given in the foregoing opinion, the judgment is affirmed.

MR. JUSTICE HOLLOWAY, being disqualified, takes no part in this decision.

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IN RE KELLY'S ESTATE.

(No. 2,080.)

(Submitted November 17, 1904. Decided December 1, 1904.)

*Probate Proceedings—Appealable Orders.*

Under Code of Civil Procedure, Section 1722, Subdivision 3, as amended by Laws of 1899, page 146, which enumerates the specific instances in which an appeal may be taken to the supreme court from a district court in probate proceedings, orders refusing to vacate a decree of distribution and settlement of final account, and refusing to vacate an order settling an administrator's account and discharging him, which are not among the judgments or orders enumerated in the statute, are not appealable.

ON MOTION FOR REHEARING.

(Decided January 23, 1905.)

The term "final judgment" as used in Code of Civil Procedure, Section 1722, Subdivision 2, refers only to those judgments known at common law as final judgments, and has no application to the statutory determinations and orders termed "orders or judgments" in probate proceedings.

*Appeal from District Court, Lewis and Clarke County; J. M. Clements, Judge.*

IN THE matter of the estate of Patrick Kelly, deceased. From orders denying an application to vacate a decree of distribution, and refusing to vacate an order settling the administrator's account, one Harold Kelly, an alleged heir, appeals. Dismissed.

*Messrs. Carpenter, Day & Carpenter, for Appellant.*

*Mr. A. J. Galen, for Respondent.*

MR. COMMISSIONER CALLAWAY prepared the following opinion for the court:

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31	356
35	202



One Harold Kelly, alleging himself to be an heir of Patrick Kelly, deceased, has attempted to appeal from two orders made by the district court, viz., from an order denying his application to vacate the decree of distribution in the matter of the estate of Patrick Kelly, deceased, and from an order denying his application to vacate an order settling the administrator's account and discharging him.

It is apparent that no appeal lies from either of the orders mentioned.

Subdivision 3 of Section 1722, Code of Civil Procedure, as amended (Session Laws 1899, p. 146), provides that an appeal may be taken to the supreme court from a district court in the following cases: "From a judgment or order granting or refusing to grant, revoking or refusing to revoke, letters testamentary or of administration, or of guardianship; or admitting or refusing to admit a will to probate, or against or in favor of the validity of a will, or revoking the probate thereof; or against or in favor of setting apart property, or making an allowance for a widow or child; or against or in favor of directing the partition; sale or conveyance of real property, or settling an account of an executor, or administrator, or guardian; or refusing, allowing, directing the distribution or partition of an estate, or any part thereof, or the payment of a debt, claim, legacy or distributive share; or confirming or refusing to confirm a report of an appraiser setting apart a homestead."

The foregoing enumerates all the cases in which an appeal may be taken to this court from the district court in probate proceedings, and an order refusing to vacate a decree of distribution and settlement of final account is not one of them; neither is an order denying an application to vacate an order settling an administrator's account and discharging him. (*In re Wiard's Estate*, 83 Cal. 619, 24 Pac. 45.) It has been uniformly held that an appeal from an order of the character of those before us cannot be sustained unless the orders are specifically enumerated in the statute. (*Estate of Calahan*, 60 Cal. 232; *Estate of Dean*, 62 Cal. 613; *Lutz v. Christy*, 67 Cal. 457, 8 Pac. 39.)

"The party against whom an appealable judgment or order has been made, or who is aggrieved thereby, may not appeal from an order refusing to vacate, dissolve or modify it." (*Butte Con. M. Co. v. Frank*, 24 Mont. 506, 62 Pac. 922.)

If the appellant found himself too late to appeal from the orders which he moved to set aside and vacate, he should have adopted a different course from that pursued in order to obtain relief.

In our opinion, the court has not jurisdiction to entertain these appeals, and they should be dismissed.

PER CURIAM.—For the reasons given in the foregoing opinion, the appeals are dismissed.

#### ON MOTION FOR REHEARING.

(Decided January 23, 1905.)

MR. CHIEF JUSTICE BRANTLY delivered the opinion of the court.

The appellant has presented a petition for a rehearing in this cause, assigning as ground therefor that, in dismissing the appeal, this court overlooked its own decisions, which control when applied to the facts of this case. He cites *In re McFarland's Estate*, 10 Mont. 446, 26 Pac. 185, where it was held that a decree of distribution, made by a district court exercising its probate jurisdiction was, under the Compiled Statutes of 1887 (Sec. 445, Code of Civil Procedure), a final judgment from which an appeal lay. From this he argues that, being a final judgment, an order denying a motion to set it aside on the ground of mistake, inadvertence, etc., is a special order after final judgment, and hence is appealable under Subdivision 2 of Section 1722 of the Code of Civil Procedure of 1895 as amended by the Session Laws of 1899, p. 146. The provisions of this section were considered in *In re Tuohy's Estate*, 23 Mont. 305, 58 Pac. 722, and the conclusion was reached that Subdi-

vision 2 of the section has no application to orders in probate proceedings, except in so far as it is made applicable by other provisions, such as Section 2921 of the same Code, providing for an appeal from an order granting or denying a motion for a new trial in probate proceedings. The term "final judgment" as used in Subdivision 2, *supra*, refers only to those judgments known at common law as final judgments, and has no application to the statutory determinations and orders termed "orders or judgments" in probate proceedings. The cases of *In re McFarland's Estate*, *supra*, and *In re Higgins' Estate*, 15 Mont. 475, 39 Pac. 506, were cited and, for reasons there stated, were held not applicable.

We see no reason why we should overturn the rule stated in that case.

The petition is denied.

*Denied.*

MR. JUSTICE MILBURN and MR. JUSTICE HOLLOWAY concur.

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McALLISTER, RESPONDENT, v. ROCKY FORK COAL  
COMPANY, APPELLANT.

(No. 1,971.)

(Submitted October 21, 1904. Decided December 1, 1904.)

*Trial—Jury—Disregard of Instructions—Appeal.*

Where the evidence in the record clearly shows that the jury disregarded the instructions of the trial court, the verdict will be set aside, without determining the propriety of the instructions.

*Appeal from District Court, Carbon County; Frank Henry, Judge.*

ACTION by James H. McAllister against the Rocky Fork Coal Company of Montana. From a judgment for plaintiff, and from

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an order overruling a motion for a new trial, defendant appeals. Reversed.

*Mr. William Wallace, Jr., for Appellant.*

*Mr. George W. Pierson, for Respondent.*

MR. COMMISSIONER CLAYBERG prepared the following opinion for the court:

Appeal from judgment against defendant, and from an order overruling a motion for a new trial.

The action was to recover damages for a personal injury arising from the alleged negligence of defendant. The record discloses that plaintiff was employed at the time of the accident in operating a shearing machine in defendant's coal mine; that there was supplied to operators of these machines a pump jack for raising the machines when such raising was required or necessary; that this pump jack was intended to be operated by means of a handle about 27 inches long, fitting closely in the socket of the pump jack; that plaintiff used a sprag in such operation, which is about 17 inches long, and pointed at both ends, and which was intended for use in blocking the wheels of cars; that the teeth or cogs upon the upright bar and upon the sprockets of the pump jack used by plaintiff were so worn that, in raising the shearing machine with this pump jack, the teeth or cogs slipped past each other, and the weight of the shearing machine, falling upon the upright bar, threw the sprag upward, so that it struck plaintiff in the eye, destroying the same. The negligence alleged, and upon which the judgment is based, is want of reasonable care on the part of defendant in furnishing the plaintiff this pump jack, which it is claimed was defective. It is alleged in the complaint that the defendant knew that it was out of repair, and that the plaintiff did not know it, and could not have ascertained that fact by the exercise of reasonable diligence. The answer denies all the material allegations of the complaint, and alleges as a defense contributory negli-

gence of plaintiff, and that he assumed the risk of injury when he was employed by the defendant in the capacity of machine runner. Plaintiff testified that he had no knowledge of the worn condition of the pump jack, but testimony was given by defendant's witnesses, and also drawn out of some of plaintiff's witnesses on cross-examination, that the condition of the jack could have been ascertained by merely lifting the upright bar so as to expose the notches or cogs thereon, and by pushing the handle of the machine down so as to expose the upper sprocket, and by lifting the handle so as to expose the lower sprocket. Therefore defendant claims that plaintiff should be charged with knowledge of its condition. Defendant also claims that a pump jack is a common tool, which needs no inspection by the defendant, and that the plaintiff must have known of its condition at the time he used it, and therefore assumed the risk of injury from such use. Defendant further insists that the jack was not intended to be operated with a sprag, but with a handle made for that purpose, and that, if no handle was with the jack at the time plaintiff took it for use, it was his duty to have procured one prior to the use of the jack, and is guilty of contributory negligence which bars a recovery.

The court instructed the jury with reference to defendant's liability on account of the defective pump jack as follows:

"There is no duty, even as to complicated machinery, to see to it at all times that it is in perfect condition, but only to use reasonable care in its inspection. And as to defects that can be seen as readily by the person working with the implement as by an inspector specially appointed by the master, it is equally the duty of the workman using the tool or implement to know of the defect, if any there is. So as to the pump jack. If its slipping was due to the wearing of the teeth or ratchets, and this worn condition could have been discovered by an examination of the jack, then, in placing the plaintiff to work with such a pump jack, even though it was liable to slip, defendant would not be violating any duty owed plaintiff, and he could not recover in this action, unless you find by a preponderance of the

evidence that the condition of the pump jack could not have been seen by raising the lifting bar and examining its notches, and the possibility of its slipping could not have been thus discovered. The court instructs you it was the duty of the plaintiff to make such examination, and if by doing so he might have discovered the possibility of the jack slipping, his failure to do so would prevent him from recovering in this action, and your verdict must be for the defendant.

"If, as a reasonable person, possessed of ordinary skill requisite to run a machine and use a pump jack— and, having accepted employment for this purpose, plaintiff must be presumed to have possessed such skill—if the plaintiff, by raising the lifting bar, might have been warned of the possibility of the jack slipping, his failure to do so would prevent him from recovering in this action.

"Plaintiff, having accepted employment as a machineman and run this machine, could not be heard to say he did not possess the necessary skill to operate it and the pump jack belonging to it. And if he was in charge of the machine, it would be his duty to inspect it and the pump jack, and, the duty being upon him to perform this inspection, he could not recover in this action for any defect that could have been discovered by an ordinarily careful inspection."

These instructions were the law of the case, binding upon the jury, and it was the duty of the jury to follow them, notwithstanding they may be erroneous; and a verdict rendered in disregard of them was against the law. (*Murray v. Heinze*, 17 Mont. 353, 42 Pac. 1057, 43 Pac. 714; *State v. Dickinson*, 21 Mont. 595, 55 Pac. 539; *King v. Lincoln*, 26 Mont. 157, 66 Pac. 836.)

The record clearly discloses evidence tending to show that the condition of the pump jack could have been ascertained by an examination as above indicated. Therefore the verdict discloses that the instructions above quoted were disregarded by the jury.

We have not overlooked the testimony of plaintiff's witnesses to the effect that it could not be determined whether the jack

would slip without testing it by attempting to raise a weight. But such testimony does not, in our opinion, take the case out of the rule above announced, as the charge above quoted made the basic factor thereof the *condition* of the jack, and the fact that plaintiff could have ascertained that condition by merely looking at it in the way designated, and not whether the cogs would slip under a weight. If the cogs or teeth were worn, it might or might not have been dangerous, depending on the extent of the wear, and the circumstances under which it might be used. Under the charge above quoted, if plaintiff knew or should have known of its condition, and used it without objection, he assumed the risk of its dangerous condition, and the personal injury resulting from such use.

That part of the charge relating to the use of the sprag instead of a handle was also disregarded by the jury. The instructions in reference thereto were as follows:

"If the defendant company furnished a lever fitting the socket of this pump in the first instance, it would have discharged its duty in this regard. And in working the pump jack it would be the duty of the plaintiff to use such lever, and, if it was too long, to ask that it be cut off to proper length, or request another, shorter one. He would not be justified, because the lever originally furnished was too long, in using a sprag or other implement not intended for the purpose of pumping the jack, nor would he be justified in using such sprag simply because there was no lever with the pump jack at the time he started to work with the machine; but it would have been his duty to have asked for a proper lever, and if, without asking for the lever, he used the sprag, and the evidence fails to satisfy you by a preponderance or greater weight thereof that the use of the sprag did not assist in causing the injury, then plaintiff's use of the sprag is his own fault, and, whatever the fault of the defendant in the action, the plaintiff could not recover.

"In accordance with the foregoing, if the plaintiff could have used a lever fitting the socket, and with it have lifted the shearing machine with less danger to himself than with the stick he

did use, called a 'sprag,' he ought to have used the lever, and he would not be justified in failing to use it because he found none at the machine or with the jack at the time he started to work with it; but it would have been his duty to have gone or sent his assistant to have procured the proper lever before undertaking to use the jack. And if the accident was caused by the use of a sprag instead of the lever, he cannot recover, and your verdict must be for the defendant.

"Again, if a long lever could be used in any manner to lift the shearing machine, and its use would have diminished the danger resulting from possible slipping of the jack with the weight of the shearing machine upon it, or would have made it less likely that the point of the lever could have put out his eye, if it was put out by the point of the sprag or by the sprag itself, then he would have been bound to avoid the use of the sprag; and if he sustained his injury in consequence of the shortness of the sprag, either because he had not sufficient leverage to resist the impact of the dropping machine, or because its length was such as to enable it to reach and strike his eye, or because its shape and fitting in the socket diminished his power of control over the weight of the machine, then his injury would be due to the use of the sprag, and he would have assumed the risk of using it, and could not recover in the action, and your verdict must be for defendant."

The record discloses that plaintiff used a sprag instead of a handle when he operated the pump jack. It also discloses uncontradicted evidence introduced by defendant's witnesses tending to show that the use of a sprag was not as safe as the use of a handle as furnished by the defendant in the first instance, for the pump jack, and also that the injury to his eye would not have occurred as it did had a handle been used instead of a sprag, and that the injury might have been occasioned in consequence of the shortness and shape of the sprag. Therefore the verdict is directly in conflict with the instructions above recited.

Under the decisions of this court in *Murray v. Heinze*, *supra*, and other cases, we cannot determine upon this appeal whether



such instructions are erroneous or correct. We therefore advise that the judgment and order appealed from be reversed, and the cause remanded for a new trial.

PER CURIAM.—For the reasons stated in the foregoing opinion, the judgment and order are reversed, and the cause is remanded.

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STATE, RESPONDENT, v. TULLY, APPELLANT.

(No. 2,054.)

(Submitted September 26, 1904. Decided December, 1, 1904.)

*Courts—Jurisdiction—State and Federal Courts — Fort Missoula Military Reservation—Homicide — Statutes—Executive Orders — Instruction — Criminal Law — Argument of Counsel — Objection — Remarks of Court—Appeal—Questions Reviewable.*

1. An information stating generally that a crime was committed in Missoula county, but containing no other allegation as to venue, is sufficient; it not being necessary that it should allege that the crime was not committed on the Fort Missoula military reservation, which is situated within that county.
2. Judicial notice may be taken of the fact that the Fort Missoula military reservation is situated in Missoula county.
3. A motion in arrest of judgment must be founded on some defect in the information mentioned in Section 1922, Penal Code.
4. Extrinsic evidence cannot be received at a hearing on a motion in arrest of judgment.
5. *Held*, that neither title to, nor sovereignty over, that part of section 36, township 13, N. R. 20 W., upon which some of the buildings of Fort Missoula were erected, ever passed to the state of Montana under Act of Congress of February 22, 1889, granting land to the proposed state of Montana, and hence that the state court had no jurisdiction over a homicide committed on such part of said section 36.
6. Under Section 3150, Code of Civil Procedure, the courts take judicial notice of executive orders of the federal government creating the Fort Missoula military reservation.
7. On a criminal prosecution, the county attorney made certain statements as to what, in his opinion, the evidence showed. Objection was made to such line of argument, and the court said that the county attorney had a right to state his theory of the case, and what the evidence showed, or tended to show, as a matter of argument, but that the jury should understand that what he had said was in argument, and not as a statement of fact. *Held*, that such remarks of the court were not erroneous.

8. Where no exception was taken to remarks of the court in ruling on an objection to an argument of counsel, the matter could not be considered on appeal.

MR. JUSTICE MILBURN dissenting in part.

*Appeal from District Court, Missoula County; F. C. Webster, Judge.*

JOHN TULLY was convicted of murder in the first degree. From the judgment, and from the order overruling his motion for a new trial, he appeals. Reversed.

*Mr. E. E. Hershey, for Appellant.*

*Mr. James Donovan, Attorney General, for the State.*

The court is bound to take judicial notice of the public official records of the executive department of the United States with reference to the establishment and boundaries of the Fort Missoula Military Reservation. (Code of Civil Procedure, Sec. 3150; Sen. Ex. Doc. Vol. VI, 1881-82, Executive Doc. 167; Sen. Ex. Doc. Vol. VI, 1885-86, Executive Doc. 79; Sen. Ex. Doc. Vol. XI, 1887-88, Executive Doc. 258; see also Vol. XIX, Opinions of Attorneys General, p. 370.) A military reservation is an act of the president, under authority of law, withdrawing so many acres of the public domain from the immediate administration of the commissioner of the public lands, that is, from sale at public auction, and by pre-emption or general private entry, and appropriating it, for the time being, to some special use of the government. (*Ter. v. Burgess*, 8 Mont. 73.) The Fort Missoula Military Reservation was created by the executive orders of February 8, 1877, and of August 5, 1878, which are presumed to have been made by authority of the president of the United States. (*Wilcox v. Jackson*, 13 Pet. 498; *U. S. v. Stone*, 2 Wall. 537; 26 Am. and Eng. Ency. Law, p. 225, note 2.) The limits of the reservation are determined by the descriptions contained in said executive orders, and not by the occupancy of the military. (*U. S. v. Stone, supra.*)

It will be observed that the reservation was created before the post buildings were erected, the land being described by reference to section numbers. If the occupation by the military constituted a reservation of the land for military purposes, there would be no necessity for an executive order or action by congress for that purpose; hence, no necessity for the recommendations made by the secretary of war to congress upon that subject. In August, 1878, it came officially to the knowledge of the war department that most of the buildings of the post were located on the east half of section 36, twp. 13 N., R. 20 W., a school section, by reason of which the secretary of war at four different times requested of congress legislation setting aside the said east half of said section 36.

It is admitted by counsel for the appellant that the offense was actually committed on section 36, a school section, but in evasion of the real question counsel says: "We do not see why section 36 could not be occupied and used by the military at Fort Missoula the same as any other portion of the public lands." For the purposes of the argument it may be admitted that it could be used and occupied, but not rightfully so unless congress or the executive department of the United States had first set it aside as a military reservation; but the fact remains that such action was not taken either by congress or the executive department, and without action by one or the other section 36 remains as much outside of the reservation as does the land upon which the state capitol building is erected. The officer in command of the troops at Fort Missoula might, under certain imaginable circumstances, bring his entire command to Helena and establish a camp upon the capitol grounds. While such grounds were so rightfully occupied by him they would probably be under the "military jurisdiction," for the time being at least, of the commanding officer, just as Major Torrey stated that the portion of the school section occupied by the United States buildings was under his military jurisdiction. But the state capitol grounds would not thereby be added to the Fort Missoula reservation, and pass under the jurisdiction of the United States

courts. In other words, the question of what is the Fort Missoula reservation is not one of occupancy and use by United States troops, but one rather of title, of boundaries as fixed by executive order, of due establishment by law. The land and only that land included in the executive orders of 1877 and 1878 constitutes the Fort Missoula military reservation, whether actually occupied by troops or not, and the fact that the buildings of the post are upon other lands not included in such orders does not give the United States jurisdiction of offenses committed upon such other lands, nor deprive the state courts of jurisdiction of such offenses.

By Section 1 of Article II of the Constitution of Montana, exclusive jurisdiction of the United States is conferred over the military reservation of Fort Missoula "as now established by law." (See also, par. 17 of Section 8 of Article I, Const. U. S.) The construction of reservation buildings upon section 36 is not an establishing of the reservation upon that section in the sense in which that term is used in the Constitution, but, as heretofore stated, it can only be established by proper executive order or by act of congress. The war department recognizes that "the only right that the military department possesses to the occupied portion of section 36 is that of occupancy," and "that this right of occupancy is sustained by the post commander." There is a very broad distinction between this so-called "military jurisdiction," and the exclusive jurisdiction vested in the United States courts over military reservations. Military jurisdiction is for military purposes only, and in times of peace is always subordinate to the civil power. (20 Am. and Eng. Ency. Law, p. 619.)

MR. COMMISSIONER POORMAN prepared the following opinion for the court:

Defendant was convicted of murder in the first degree. A motion in arrest of judgment was interposed and overruled. Defendant then moved for a new trial. This motion was also

overruled. The appeal is from the judgment, and from the order overruling the motion for a new trial.

1. The information states generally that the crime was committed in Missoula county, but contains no other allegations of venue. The defendant contends that inasmuch as the court takes judicial notice of the fact that Fort Missoula military reservation is situated within Missoula county (Section 3150, Code of Civil Procedure), and that the federal courts have exclusive jurisdiction of the trial of this offense if committed thereon (Section 40 *et seq.*, Political Code; Section 1, Art. II, Constitution of Montana), the information should contain some averment that the crime, though committed within the county, was not committed on this reservation. This question as to the sufficiency of the information, and the further claim of defendant that the court erred in overruling his motion in arrest of judgment, and the further claim that the court erred in receiving evidence on the hearing of the motion in arrest of judgment, will be considered together.

(a) District courts are courts of general jurisdiction. The counties constituting each district are designated by legislative enactment. In this enactment no exception is made of reservations. The form of information given in Section 1833 of the Penal Code contains no allegation relating to venue, except the general statement that the offense was committed within the county. Section 1841, Penal Code, specifies what must be alleged in an information. That relating to venue is contained in Subdivision 4, which reads: "That the offense was committed at some place within the jurisdiction of the court, except where the act, though done without the local jurisdiction of the county, is triable therein." Criminal actions must be tried in the county where the offense was committed (Section 16, Art. III, Constitution of Montana); and when "an offense is committed in part in one county and in part in another," or "on the boundary of two or more counties," the jurisdiction is in either county. (Sections 1564, 1565, Penal Code.) The exception named in Subdivision 4 of Section 1841, *supra*, un-

doubtedly refers to offenses committed in the manner named in said Sections 1564 and 1565.

It is true, the court may take judicial notice that this military reservation is situated within Missoula county, and that the state court has no jurisdiction of this offense, if committed thereon; yet the jurisdiction of the federal courts being exceptional, and that of state courts general, it is not necessary, in an information, to negative the jurisdiction of the federal courts. Where a statute states in detail what must be alleged with reference to venue, such allegations need not be broader than the statute.

Practically this same question was before the Supreme Court of California in *People v. Collins*, 105 Cal. 504, 39 Pac. 16, where the court said: "The jurisdiction of the state being general, and that of the United States exceptional, it is not necessary to negative, in an indictment or information in the state courts, the jurisdiction of the federal courts. It is like an exception in an act creating or defining a public offense, in which case it is held that, if the exception is not necessary to the description of the offense, it need not be alleged or negated, but is matter of defense simply."

In *Territory v. Burns*, 6 Mont. 72, 9 Pac. 432, this court said: "When an exception is stated in the statute, it is not necessary to negative such exception, unless it is a constituent part of the definition of the offense."

This same question relative to the error complained of was passed upon in *State v. Spotted Hawk*, 22 Mont. 33, 55 Pac. 1026, where the court said: "The information is in conformity with the statute. The district court has general jurisdiction of all offenses committed within the limits of the county where it sits. The allegation quoted *supra* is surplusage. If the defendant should be charged with a crime committed out of the court's jurisdiction, this is a matter to be taken advantage of at the trial. The authorities cited by counsel in the brief have reference to courts of limited jurisdiction, and have no application." We find no reason for disturbing the decision in the *Spotted*

*Hawk Case*, but hold this information sufficient as to its allegations respecting the venue of this offense.

(b) A motion in arrest of judgment must be founded on some defect in the information (Section 2200, Penal Code) mentioned in Section 1922 of the Penal Code. One of the defects mentioned in this latter section is where it appears that the court has no jurisdiction of the offense charged therein. The only error complained of here is lack of jurisdiction, and in this the contention of defendant is not sustained. Whether the failure to demur was a waiver, within the meaning of the decision in *State v. Mahoney*, 24 Mont. 281, 61 Pac. 647, is immaterial. The motion was properly overruled.

(c) At the hearing on the motion in arrest of judgment the attention of the court was called to certain matters relating to the *situs* of Fort Missoula military reservation, to which reference had not been made at the trial of the case, and these matters were inserted in the record. Extrinsic evidence cannot be received at the hearing on a motion in arrest of judgment. (*People v. Johnson*, 71 Cal. 384, 12 Pac. 261; *Commonwealth v. Brown*, 150 Mass. 334, 23 N. E. 98; *King v. State*, 91 Tenn. 617, 20 S. W. 169; *State v. Creight*, 2 Am. Dec. 656.)

It is claimed by respondent that the matters to which the attention of the court was directed were only such as could be noticed judicially. However this may be, the information not being open to any objection made, and none of these matters being used or inserted in the record until after verdict, the defendant was not in any manner prejudiced; and the questions raised on the motion have here been examined and considered irrespective of any extrinsic matter.

2. The question of jurisdiction is again urged on the motion for a new trial, the defendant maintaining that the evidence shows that the offense was committed on the Fort Missoula military reservation. The evidence shows that both the defendant and the deceased were soldiers stationed at Fort Missoula, and that the homicide was committed on October 18, 1903, on Sec. 36, Twp. 13 N., R. 20 W., on the sentry beat just back of the

commissary building; that several other buildings then used by the military authorities as a part of the post of Fort Missoula were situated on this section; and that, so far as military jurisdiction goes, the commanding officer of the post was supreme over the tract of land thus occupied. Military jurisdiction, however, does not in time of peace extend to the trial of persons accused of murder, although both the defendant and the deceased were, at the time the homicide was committed, soldiers in the United States army, and the offense was committed on a military reservation. This question was considered at some length in *United States v. Clark*, (C. C.) 31 Fed. 710, where the authorities are reviewed and discussed.

The Constitution of the United States reserves authority in congress to exercise exclusive jurisdiction over military reserves. Section 8, Article I, in part provides: "To exercise exclusive legislation in all cases whatsoever, over such district (not exceeding ten miles square), as may, by cession of particular states, and the acceptance of congress, become the seat of government of the United States, and to exercise like authority over all places purchased by the consent of the legislature of the state in which the same shall be, for the erection of forts, magazines, arsenals, dock-yards and other needful buildings." With reference to the term "exclusive legislation," as used in the Constitution, Justice Story, in *United States v. Cornell*, 2 Mason, 60, Fed. Cas. No. 14,867, says: "The Constitution of the *United States* declares that congress shall have power to exercise 'exclusive legislation' in all 'cases whatsoever' over all places purchased by the consent of the legislature of the state in which the same shall be, for the erection of forts, magazines, arsenals, dock-yards and other needful buildings. When, therefore, a purchase of land for any of these purposes is made by the national government, and the state legislature has given its consent to the purchase, the land so purchased, by the very terms of the Constitution, *ipso facto* falls within the exclusive legislation of congress, and the state jurisdiction is completely ousted.



This is the necessary result, for exclusive jurisdiction is the attendant upon exclusive legislation."

On the admission of Montana into the Union, sections 16 and 36 in each township not reserved were granted to the state as school lands. That part of the Act of Congress relating thereto (Act February 22, 1889, c. 180) is as follows: "That upon the admission of each of said states [Washington, North Dakota, South Dakota and Montana], sections 16 and 36 in every township of said proposed states, where such sections or any part thereof have been sold or otherwise disposed of by or under the authority of any act of congress, or other lands equivalent thereto, in legal subdivisions of not less than a quarter section, and as contiguous as may be to the section in lieu of which the same is taken, are granted to said state for the support of common schools, such indemnity lands to be selected within said states, in such manner as the legislature may provide, with the approval of the secretary of the interior. Provided, that the sixteenth and thirty-sixth sections embraced in permanent reserves for national purposes shall not at any time be subject to the grant, nor to the indemnity provisions of this act, nor shall any land embraced in Indian, military or other reserves of any character be subject to the grants or indemnity provisions of this act, until the reserve shall have been exhausted, and such lands be restored to and become a part of the public domain." (Enabling Act (Political Code, p. lxxvii) 25 U. S. Stat. 679, Sec. 10.) By the act of admission the United States transferred to the state full authority to exercise complete sovereignty in the enforcement of state law over all lands and places not reserved, though the United States retained their proprietary interest in all lands not granted or sold. Montana was admitted into the Union upon "an equal footing in all respects with the original states." Sovereignty once vested in the state remains there, unless by some act on the part of the state it reverts to the general government. (*U. S. v. Stahl*, Woolw. 192, Fed. Cas. No. 16,373; *Draper v. U. S.*, 164 U. S. 240, 17 Sup. Ct. 107, 41 L. Ed. 419.)

In *United States v. Bateman*, (C. C.) 34 Fed. 86, the court, in considering a question of jurisdiction of a homicide committed on the Presidio military reservation, said: "The United States were both proprietors and sovereigns of the Presidio lands till the admission of the state of California into the Union. By the act of admission, reserving only their proprietary right over these lands, they relinquished to the state their governmental or local sovereign right and jurisdiction, and were thenceforth only proprietors in the sense that any natural person owning land is a proprietor. Having so relinquished their sovereign rights, that condition remains to this day, unless the state has in some way, either directly or by implication, receded to the United States its sovereign jurisdiction. This could be done by direct cession, or by consent through its legislature to the purchase of land for such governmental purposes, and a purchase for such purpose in pursuance of such consent."

In *United States v. San Francisco Bridge Co.*, (D. C.) 88 Fed. 891, the court, in considering a question of jurisdiction, after quoting that part of the United States Constitution referred to above, said: "It is not alleged in the information, nor does the fact otherwise appear, that the land upon which the new San Francisco postoffice is being constructed was purchased by the United States with the consent of the state, or that political jurisdiction over the same has been otherwise ceded to the United States by the state. Upon this state of facts, it must be held that the state of California retains complete and exclusive political jurisdiction over such land; and, this being so, there can be no question that persons who commit murder, or any other offense denounced by its laws, would be subject to trial and punishment by the courts of the state. 2 Story, Const. par. 1227; *People v. Godfrey*, 17 Johns. 225; *Ex parte Sloan*, 4 Sawy. 330, Fed. Cas. No. 12,944; *U. S. v. Stahl*, Woolw. 192, Fed. Cas. No. 16,373; *U. S. v. Ward*, Woolw. 17, Fed. Cas. No. 16,639; *U. S. v. Cornell*, 2 Mason, 60, Fed. Cas. No. 14,867. In the case last cited it was said by Mr. Justice Story: 'But although the United States may well purchase and hold lands

for public purposes, within the territorial limits of a state, this does not, of itself, oust jurisdiction or sovereignty of such state over the lands so purchased. It remains until the state has relinquished its authority over the land, either expressly or by necessary implication.’”

The question in the case at bar is not whether the general government regained sovereignty, but whether it in fact ever parted with its original sovereignty. Section 1, Article II, of the Constitution of Montana, and Section 41 of the Political Code of Montana, provide: “Authority is hereby granted to and acknowledged in the United States to exercise exclusive legislation as provided by the Constitution of the United States over the military reserves of Fort Assinaboine, Fort Keogh, Fort Maginnis, Fort Missoula and Fort Shaw, as now established by law, so long as said places remain military reserves to the same extent and same effect as if said reservation had been purchased by the United States by consent of the legislative assembly of the state of Montana.” The Constitution of Montana thus acknowledges absolute sovereignty in the United States over the places named or referred to in the section of that instrument just quoted, but the state of Montana has, through its legislative assembly, gone further, and recognized absolute authority in the general government over all places subsequently acquired and used by the government for any of the purposes named in the Constitution of the United States. (Sections 42, 43, Political Code of Montana.) Said Section 42 consents to the purchase or condemnation by the United States of any land within the state for the purpose of erecting forts, magazines, arsenals, courthouses, postoffices and other needful buildings, and the only condition attached to this consent is that process of the state may be served in any of such places. Said Section 43 provides, in substance, that the state gives its consent to the purchase, and exclusive jurisdiction is ceded to the United States over and with respect to any lands within the limits of the state which shall be acquired by the United States for any of the purposes described in Article I, Section 8, paragraph 17, of the

Constitution of the United States, provided that a map or plat describing such lands by metes and bounds shall be filed, etc., and that the state reserves the right to tax property of railroad or other corporations having a right of way over and upon said land.

Under these provisions of the Political Code the state consents to the purchase, condemnation or acquisition of lands by the United States. Where, however, the United States still retains its original ownership of the land, it is apparent that neither purchase, condemnation nor acquisition is necessary, but that actual occupation for any purpose indicated in these sections stands in lieu thereof. Mere occupancy of government land by the military for any purpose not indicated in the law or the Constitution would not of itself be sufficient to divest the state of the sovereignty granted to it by Congress, nor does the right reserved to serve state process on these reservations infringe on the exclusive jurisdiction of the United States.

In *United States v. Meagher*, (C. C.) 37 Fed. 875, the court says: "The state, in the instrument of cession, merely reserves the right to serve process upon persons within the ceded land who may have committed offenses elsewhere, and I do not understand that its purpose is to reserve a concurrent jurisdiction over the territory ceded."

The same doctrine is held in *United States v. Cornell*, 2 Mason, 60, Fed. Cas. No. 14,867; and in *Fort Leavenworth Railroad Co. v. Lowe*, 114 U. S. 525, 5 Sup. Ct. 995, 29 L. Ed. 264, this language is used: "The reservation which has usually accompanied the consent of the states that civil and criminal process of the state courts may be served in the places purchased is not considered as interfering in any respect with the supremacy of the United States over them, but is admitted to prevent them from becoming an asylum for fugitives from justice."

That the state courts have no jurisdiction over this homicide, if committed on a military reservation, is well established. (Const. U. S. *supra*; *U. S. v. Cornell*, *supra*; *U. S. v. Clark*,

(C. C.) 31 Fed. 710; *State v. Kelly*, 49 Am. Rep. 620; *Lasher v. State*, 30 Tex. App. 387, 17 S. W. 1064, 28 Am. St. Rep. 922.)

Congress expressly provided for the punishment of murder and manslaughter committed in such places (Rev. St. U. S. Sec. 5339 *et seq.* [U. S. Comp. St. 1901, p. 3627]), and has conferred exclusive jurisdiction upon the federal courts (Rev. St. U. S. Sec. 629 [U. S. Comp. St. 1901, p. 503]). *State v. Kelly*, above.

A different rule applies with reference to the jurisdiction of state courts of offenses committed on Indian reservations than that which obtains with reference to military reservations. Indian reservations are not specifically enumerated or named in the Constitution of the United States above referred to, wherein the Congress retains absolute jurisdiction over certain lands and places, and the federal courts have repeatedly held "that where a state was admitted into the Union, and the enabling act contained no exclusion of jurisdiction as to crimes committed on an Indian reservation by others than Indians or against Indians, the state courts were vested with jurisdiction to try and punish such crimes." (*U. S. v. McBratney*, 104 U. S. 621, 26 L. Ed. 869; *Draper v. U. S.* 164 U. S. 240, 17 Sup. Ct. 107, 41 L. Ed. 419, and cases there cited.)

The Act of Congress granting sections 16 and 36 in each township to the state makes three classes of reservations: (1) Land not sold or otherwise disposed of; (2) lands embraced in permanent reservations for national purposes; (3) lands embraced in Indian, military and other reservations of any character. By the Act of Congress of May 26, 1864, c. 95, Sec. 14, 13 Stat. 91 (Section 1946, Rev. St. U. S.), sections numbered 16 and 36 in each township of the territory of Montana and other territories "shall be reserved for the purpose of being applied to schools in the several territories herein named, and in the states and territories hereafter to be erected out of the same."

In *United States v. Bisel*, 8 Mont. 20, 19 Pac. 251, the court, in referring to this Act, said: "While sections 16 and 36 were

reserved for the purpose of aiding the development of the public school system in the coming state of Montana, and, so far as their sale for the purpose of settlement is concerned, were segregated from the public domain, still the title to them and the dominion and control over them remain in the government of the United States."

Whether this Act of Congress was a mere general reservation, or was in effect a grant irrevocable without the consent of the people of the territory, as the decision in *Minnesota v. Batchelder*, 1 Wall. 109, 17 L. Ed. 551, was construed in the argument of counsel in the *Bisel Case*, is immaterial, for "the title to them and the dominion and control over them remain in the government of the United States," and this former Act of Congress was superseded by the subsequent Act (Montana Enabling Act), and the acceptance of statehood by the people under that Act. Moreover, the record before us practically concedes that the title to this land was in the United States at the time of the admission of the territory, and that it is still there, unless it vested in the state under and by virtue of the granting part of the Act providing for admission. This Act vests title in the state unless the lands come within the exception named. It is apparent, therefore, that the United States granted both title and sovereignty to the state, or it granted neither, for, if the land was a part of the military reservation at the time that the grant took effect, so that the title to the same did not pass, the sovereignty remains in the United States so long as such condition continues, for the congress reserves exclusive jurisdiction over military reservations. Under the terms of the grant, no land embraced in a reservation of any kind is subject thereto "until the reserve shall have been extinguished, and such land be restored to and become a part of the public domain."

Neither the term "public domain" nor "public lands" has ever been given a statutory definition. In various Acts of Congress and in the decisions of courts these terms have been used as including (1) all lands owned by the United States, whether surveyed or unsurveyed, reserved or unreserved; (2) all lands

subject to sale or other disposition under general laws; and the two terms are used interchangeably in the decisions of courts unless a different meaning seemed necessary by the terms of the law then being construed. As was said in the *Bisel Case*, "There is no statutory definition of the words 'public lands,' and the meaning of them may vary somewhat in different statutes passed for different purposes, and they should be given such meaning in each as comports with the intention of Congress in their use." (*U. S. v. Bisel*, 8 Mont. 20, 19 Pac. 251; *U. S. v. Blendaur*, 128 Fed. 910, 63 C. C. A. 636. See, also, the following United States statutes: Sections 2259, 2289, 2223 and 2380, Rev. St. [U. S. Comp. St. 1901, pp. 1388, 1362 and 1455].)

It is very apparent that the first of these definitions cannot apply to the term "public domain" as used in this Act of Congress, for land cannot be restored to the public domain if it is already a part of it. The term must therefore have reference to lands in which the public may acquire a right as lands under the jurisdiction of the land department, governed by the general laws. The use of the term "public lands" in a subsequent section would seem to sustain this construction. Section 19 of the Enabling Act (25 Stat. 682, c. 180) reads: "All lands granted in quantity or as indemnity by this Act shall be selected, under the direction of the secretary of the interior, from the surveyed, unreserved and unappropriated public lands of the United States within the limits of the respective states entitled thereto. And there shall be deducted from the number of acres of land donated by this Act for specific objects to said states the number of acres in each heretofore donated by Congress to said territories for similar objects."

Land rightfully occupied cannot be classed as unappropriated public land so long as such occupation continues. The United States had the undoubted right to appropriate and occupy this land prior to the enactment of this law, and at the time of such enactment, and the fact that the United States is the granting party does not divest them of this authority and right. This

last section quoted vests no authority in the secretary of the interior to declare lands "unappropriated" or not "otherwise disposed of," then held and actually occupied by the United States for a definite and permanent purpose, such as is specified in the United States Constitution, above quoted.

A fourth limitation is by this Section 19 placed upon this grant, by enjoining upon the secretary of the interior the duty of making the selection "from surveyed, unreserved and unappropriated public land." It appears from the record that this particular land in question was surveyed at the time of the passage of the Enabling Act, so that the floating character of these grants, until surveyed, is not an element here for consideration. The term "unappropriated" is not given a specific definition in the Act itself, and the reference of this selection to the interior department without such definition makes important the rules and decisions of that department as to when lands are there considered appropriated.

*Mather et al. v. Hackley's Heirs*, on review before the secretary of the interior, 19 Land Dec. Dep. Int. 48, is a case in point. In that case it appears that in 1824, in obedience to instructions from the war department, a certain piece of land was occupied by United States troops in cantonment, and that the land thus occupied was used until 1830, when it was formally reserved by executive order, but prior to this executive order, and in 1824, R. J. Hackley, who was then in possession of a part of the land, was ejected therefrom by the military. In 1826 Congress enacted a law confirming in all settlers upon lands in that locality prior to January 1, 1825, the right to purchase the land whereon they resided, etc. (Act April 22, 1826, c. 28, 4 Stat. 154.) It is claimed that Hackley, having settled upon this land prior to January 1, 1825, had the right to purchase the same, and that this right descended to his heirs. Secretary Smith, in deciding the question, says, in part: "In support of his position, counsel cites the case of *Johnson v. United States*, 2 Ct. Cl. 391. Johnson's claim was based upon what was known as the 'Oregon Donation Act,' and, as required by that Act, he had



settled upon and occupied the land in controversy for four years continuously, with nothing left to be done to secure patent but to make proof of the same, when the tract was forcibly taken and occupied by troops of the United States, 'without the knowledge of the president, the secretary of war, or any high officer of the government.' In that case the court held that such an occupation was not a reservation, within the meaning of the Oregon Donation Act, and could not affect the rights of the plaintiff. In the case at bar, however, the facts are very different. The tract now known as the 'Fort Brooke military reservation' was occupied under the direction of the secretary of war two years before the passage of the Act upon which the claim of the Hackley heirs is predicated. In further support of his views, counsel recites the history of Camp Stambaugh, in Wyoming territory. It appears that in 1870 the secretary of war established said military post, which was laid off as a reservation, and included all the territory within one mile of the flag-staff erected at the post. In 1881 the secretary of war notified the secretary of the interior that said post, being no longer needed for military purposes, had been discontinued. In said communication he expressed the opinion that, inasmuch as there had been no formal reservation of the lands included therein by the president, the same might be restored to the public domain, as other lands, without the consent of Congress. The secretary of the interior concurred in this opinion, and said lands were treated as having been restored to the public domain by the act of abandonment, and the subsequent notification on the part of the secretary of war. I am unable to see wherein the correspondence above referred to sustains the contention of counsel, for, while it may be true that a military post established by the secretary of war may be restored to the public domain with less formality than if it had been reserved by a formal order of the president, still the secretary of war had authority to establish cantonment Brooke, and by virtue of such establishment the lands upon which it was located were not subject to entry so long as unrelinquished. Where a military post

or cantonment is established upon the public domain, whether the same be for temporary purposes or permanent occupation by the military, if it be done by competent authority, the lands included therein are not subject to entry until properly restored to the public domain. If the secretary of war has the authority to establish a military post, it follows that, during the time that the lands included therein are occupied for military purposes, they are not subject to be disposed of under the pre-emption laws. In the case of *Wilcox v. Jackson*, 13 Pet. 498, 10 L. Ed. 264, it is held as follows: 'The president speaks and acts through the heads of the several departments in relation to subjects which appertain to their respective duties. Both military posts and Indian affairs, including agencies, belong to the war department. Hence we consider the act of the war department in requiring this reservation to be made as being, in legal contemplation, the act of the president, and consequently that the reservation thus made was, in legal effect, a reservation made by order of the president, within the terms of the Act of Congress.' It is further held in said case as follows: 'But we go further, and say that, whensoever a tract of land shall have once been legally appropriated to any purpose, from that moment the land thus appropriated becomes severed from the mass of public lands, and that no subsequent law or proclamation or sale could be construed to embrace it or to operate upon it, although no reservation were made of it.' "

The principle announced in the first quotation from the *Wilcox Case*, above, is sustained in *Wolsey v. Chapman*, 101 U. S. 755, 25 L. Ed. 915. It is further held in the *Hackley Case* that the ejectment of Hackley from his claim was itself an appropriation thereof by the military.

In the case of *James H. T. Ryman*, on appeal to the secretary of the interior, 9 Land Dec. Dep. Int. 600, it was held, "While the war department assumes and exercises for military purposes full control over the land in question, and the military, under order of the said department, holds actual possession of it, this

department will not interfere, and Ryman's application must therefore be denied."

In the case of *Wilson Davis*, 5 Land Dec. Dep. Int. 376, it is held that although a reservation for a cantonment was not in effect declared by the president, yet the actual occupation of the land by the military authorities for the purpose of a cantonment had the effect of segregating the land from the public domain, and that such cantonment should be considered a military reservation.

It is apparent from these rules and decisions that the secretary of the interior, in making the selection required by the Enabling Act, would not regard land as unappropriated which was then "occupied by United States troops in cantonment." It is a fair construction of this congressional enactment, that it was not the intention that either title to, or sovereignty over, lands actually occupied and used as a part of a permanent military reservation should pass to the state so long as such occupancy and use was continued.

The general propositions herein discussed were considered to some extent in *Territory v. Burgess*, 8 Mont. 57, 19 Pac. 558, 1 L. R. A. 808, but that case was determined while Montana was still a territory, and the decision there rendered is not applicable, except in a general way, to the construction of subsequent legislative or congressional enactments or constitutional provisions; and the question there, so far as it related to jurisdiction, was rather a question between two federal courts, than one between a federal court and a state court.

Under the provisions of Section 3150, Code of Civil Procedure, the court takes judicial notice of the executive orders creating Fort Missoula reservation. These orders are dated February 19, 1877, and August 5, 1878. In neither of them is Section 36 mentioned or referred to, but the reservation thereby created is located on other and adjoining lands. If, therefore, Section 36 is a part of Fort Missoula reservation it is made so by being reserved from the operations of the grant in such manner as to prevent title passing to the state, under the Act

of Congress above quoted, or else, if title did pass to the state, the United States has, by purchase, condemnation or other means, acquired title, and by compliance with the provisions of law has become reinvested with sovereignty.

From facts admitted by the respondent, and from matters inserted in the record by the respondent, which it is claimed the court may take judicial notice of, it appears that the buildings of Post Fort Missoula were originally—probably through error—erected on the east half of section 36, instead of on the land described in the executive order creating the reservation; that the attention of the secretary of war was called to this fact in August, 1878, and that the general of the army issued orders to the post commander of Fort Missoula to prevent any encroachments upon this land; that the secretary of war repeatedly communicated to Congress the facts relative to the location of these buildings, the last of such communications being in 1889; that these buildings were used for the purposes for which they were erected from 1878 until 1889, with the knowledge and consent of the secretary of war, and under orders from the commanding general of the army to prevent any encroachments on this land. It appears from these facts that this particular land in question was in the actual occupation of the military; that the buildings used by the post were on this land; and it is admitted in the evidence that on the day this homicide was committed, in 1903, these buildings and this land were used for this same purpose.

Subdivision 32, Section 3266, Code of Civil Procedure, relating to satisfactory and disputable presumptions; says "that a thing once proved to exist continues so long as is usual for things of that nature." And it appears that this is a permanent military reservation.

Under the decisions of the interior department above quoted, this land, on abandonment by the military, would be restored to the public lands, but there is no evidence in this record that there ever was any abandonment, by nonuser or otherwise, of this particular piece of land; and, in the absence of such evi-

dence, and under the facts above stated, it is presumed that these buildings and this land continued to be used as a part of this military reservation from the year 1878 until the time of the commission of this homicide, and that neither title to, nor sovereignty over, this land passed to the state of Montana, and that the state court had no jurisdiction over this homicide.

In the consideration of this question of jurisdiction, the Act of Congress approved March 19, 1904, c. 718, 33 Stat. 143, has not been overlooked. By the terms of that Act the secretary of war is authorized to accept from citizens of Missoula, Montana, deeds donating to the United States lands for the enlargement of the Fort Missoula military reservation. These lands so donated, as referred to in the act, embrace a part of the east half of this section 36. The United States has the lawful right to quiet title to land without litigation. Furthermore, by the decision in the *Bisel Case*, above referred to, no part of section 36 has been open to private entry or settlement since the passage of the Act of 1864; and it further appears that this land has been in the actual possession and occupation of the military since 1878, and that the Act providing for the admission of Montana was not passed until February 22, 1889, 25 Stat. 676, c. 180. It is not apparent, therefore, how these deeds could in any wise affect the question of jurisdiction involved in this case.

3. During the argument of the case the county attorney made certain statements as to what, in his opinion, the evidence showed. Objection was made to this line of argument, when the court said that the county attorney, in arguing the case, had a right to state his theory of the case, and of what the evidence showed or tended to show, as a matter of argument, and the court saw no impropriety in what the county attorney had said so far, but that the jury should understand that what he had said in this respect was said as argument, not as a statement of fact. No exception was taken, and no further argument was made along this line. The defendant contends that these remarks of the court were prejudicial. They are, however, in effect, nothing more than an overruling of defendant's objec-

tion, for, had the court merely said, "Objection overruled," he would thereby have told the jury and all others who heard him that he saw no error in the remarks objected to. No exception being taken, we cannot now consider the matter. (*State v. Cadotte*, 17 Mont. 319, 42 Pac. 857; *State v. Biggerstaff*, 17 Mont. 510, 43 Pac. 709; *State v. Bloor*, 20 Mont. 587, 52 Pac. 611.)

This does not in any manner conflict with the decision of the court in the very recent case of *State v. Harness*, (Idaho) 76 Pac. 788.

4. It is contended by appellant that the evidence is insufficient to sustain a verdict of murder in the first degree. Inasmuch, however, as the judgment and order appealed from are reversed for other reasons, we do not at this time enter into any discussion as to the sufficiency of the evidence.

We think the judgment and order should be reversed, and the cause remanded.

PER CURIAM.—For the reasons stated in the foregoing opinion, the judgment and order are reversed, and the cause remanded.

MR. JUSTICE MILBURN: I dissent. I do not agree with what is said in the opinion as to the jurisdiction of the district court. I believe it has jurisdiction.

Rehearing denied February 16, 1905.

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RIDDELL, RESPONDENT, v. RAMSEY ET AL., APPELLANTS.

(No. 1,954.)

(Submitted October 17, 1904. Decided December 1, 1904.)

*Partnership—Conversion of Firm Assets—Action by Partner—  
Complaint—Sufficiency.*

A complaint alleged that plaintiff and defendants were partners, and that defendants withdrew a portion of the firm assets from a bank, and converted them to their own use; that thereafter defendants assigned all their interest in the partnership to plaintiff; and that on the settlement and dissolution of the firm the whole of the money so wrongfully converted was due and owing and belonged to plaintiff as a portion of his share. *Held*, that the complaint failed to state a cause of action, since defendants could not assign to plaintiff any right of action growing out of the misappropriation, and there was no allegation of an accounting, either in equity or by agreement, or that on such accounting the moneys converted were found to belong to plaintiff, the allegations that such moneys were owing plaintiff being a mere conclusion.

*Appeal from District Court, Silver Bow County; E. W. Harney, Judge.*

ACTION by J. A. Riddell against George L. Ramsey and another. From a judgment in favor of plaintiff, and from an order overruling a motion for a new trial, defendants appeal. Reversed.

*Messrs. Cullen, Day & Cullen, for Appellants.*

*Mr. John J. McHatton, and Mr. George F. Shelton, for Respondent.*

MR. COMMISSIONER CLAYBERG prepared the following opinion for the court:

This is an appeal from a final judgment and from an order overruling a motion for a new trial.

The complaint upon which the action is brought is as follows:

"Comes now the above-named plaintiff, and, leave of court first having been had and obtained, files this, his amended complaint, and for cause of action against the above-named defendants alleges:

"(1) That plaintiff is a resident of the county of Silver Bow, Montana.

"(2) That the defendant Charles Suiter is now, and for a long time prior hereto has been, a resident of the county of Silver Bow, state of Montana.

“(3) That heretofore and during the years 1896 and 1897, this plaintiff, C. E. Roach, and Charles Suiter were copartners doing business as such in the state of Montana under the firm name of Riddell & Roach. That said copartnership was engaged in the erection and construction of the School of Mines building at Butte, Montana, for which it had secured the contract from the state of Montana through the state board of said School of Mines.

“(4) That at all the times hereinafter mentioned the defendant George L. Ramsey was the cashier of the Commercial National Bank at Bozeman, Montana, and as such cashier had supervision over the business of said bank, and over the paying out of all moneys which were paid out or withdrawn from the account of said copartnership, which was carried in said bank.

“(5) That it was agreed between this plaintiff, said Roach, and Suiter that all moneys belonging to the firm of said Riddell & Roach, and particularly all moneys which should be received by said copartners on account of the erection and construction of said School of Mines building under the contract aforesaid, should be kept and used by said copartnership for the purpose only of paying the cost of all labor and material necessary for the construction and erection of said School of Mines building, save that each of said copartners should be entitled to the sum of \$125 per month out of the said copartnership money to defray his living expenses during the time while said School of Mines building was being erected, and until the same should be completed.

“(6) That it was agreed by and between this plaintiff and the said Roach and Suiter that all sums of money belonging to said copartnership of Riddell & Roach, and arising from said contract for the erection of said School of Mines building, or received by said copartnership on account thereof, or for the purpose of erecting said building, should be deposited in a bank to the credit of said copartnership of Riddell & Roach, and that the same, except the sum of \$125, which was to be drawn by and paid to each member of said copartnership during the time when



said School of Mines building was in course of construction for the purpose of defraying his living expenses, should only be drawn therefrom or paid out on account of materials, supplies and labor necessarily procured, used and employed in the erection and completion of said School of Mines building. That said defendant Geo. L. Ramsey knew of said agreement between the plaintiff and his copartners, and with a full knowledge thereof solicited this plaintiff and said copartnership of Riddell & Roach to deposit the funds of said copartnership in the Commercial National Bank of Bozeman, Montana, and agreed that, if said moneys were so deposited, they should be kept in an account by said bank to the credit of Riddell & Roach for such purpose.

“(7) That during the time from on or about the month of July, 1896, to the month of March, 1897, the said firm of Riddell & Roach deposited with the said Commercial National Bank of Bozeman large sums of money belonging to it, and which were to be used for the purpose of paying for the materials and labor which were or might be necessary to be procured, used and employed in the erection of said School of Mines building, and for the living expenses of the said copartners, to-wit, the sum of \$125 per month to each of them as aforesaid. That all of the moneys which were deposited in said bank during the time aforesaid by said Riddell & Roach belonged to said copartnership in its said business of erecting and constructing said School of Mines building, and was to be used therefor, and that said defendant George L. Ramsey had full knowledge of the same, and of the agreement between this plaintiff and his copartners with regard to the use to be made of said sums of money.

“(8) That during the time when the money belonging to said copartnership was deposited in and was being deposited and kept on deposit in said Commercial National Bank of Bozeman, the defendants, Charles Suiter and George L. Ramsey, together with said C. E. Roach, and in pursuance of an agreement and scheme entered into between them to defraud the plaintiff of his rights in said copartnership and of said moneys, jointly engaged in

withdrawing large sums of money from time to time from said account, and converting the same to their own use. That said defendants and the said Roach so jointly withdrew from said account, and jointly converted to their own use, without the knowledge or consent of the plaintiff, and in fraud of his rights, the sum of \$8,200, to the damage of the plaintiff in said sum. That no part of the same was applied to the payment of any material or labor furnished or employed in the erection of said School of Mines building, or on account of said partnership business, or on account of said sums of \$125 per month which the said Suiter and Roach were entitled to use for living expenses; and that neither of said defendants or said Roach were entitled to any part of said amount so withdrawn and converted by them; and that, had said sum not been withdrawn and converted to the aforesaid use, the whole thereof would have remained to the plaintiff upon the dissolution of said partnership hereinafter alleged, and would have belonged to him free from any claim of right of said defendants or the said Roach.

“(9) Plaintiff alleges that said defendants and said Roach during all the time that they were withdrawing said money from said account and converting the same to their own use concealed the same from the plaintiff, and falsely represented to him that all moneys which had been deposited in said bank were being kept and used only for the purposes of said copartnership, as aforesaid, and that the whole amount which was paid out or which was being paid out or withdrawn from said bank, aside from the monthly allowance to the members of said copartnership, was paid out and was being paid out for labor and material necessarily employed, procured and used and to be used in the construction of said School of Mines building. That he relied upon such representations, and that by reason thereof, and by reason of the concealment of the conversion of said moneys by the defendants and said Roach, he was prevented from having any knowledge thereof until on or about the 20th day of January, 1898, and that by reason of the fraudulent acts, concealments and representations of said defendants and said Roach

he did not know of any sum or amount of said money having been converted by them to their own use until on or about said day.

“(10) That on or about the . . . . day of March, 1897, said copartnership was dissolved as to said C. E. Roach, and that on or about said day said C. E. Roach sold, assigned, transferred and set over unto the plaintiff all of his rights in and to said copartnership and in and to all of the property, claims, demands and rights of actions thereto belonging, and thereupon the rights of said Roach in and to said copartnership were fully determined and settled, and said copartnership fully dissolved as to him, and the plaintiff is now, and ever since said time has been, the owner and entitled to all of the rights of said Roach in and to said partnership, its business, property and assets. That thereafter the plaintiff and said Charles Suiter conducted the said copartnership business up until the 26th day of November, 1897, when, by mutual agreement between plaintiff and said Suiter, said copartnership was entirely dissolved, and thereupon said Suiter assigned and transferred to the plaintiff all of his rights in said copartnership and in and to all of the accounts, claims, demands, rights of action and property of every kind theretofore belonging thereto; and that this plaintiff is now, and ever since said time has been, the owner of all of the property, rights, claims, accounts and demands of every kind and description theretofore belonging to said copartnership, or in which said C. E. Roach and Charles Suiter had any interest as copartners. That said Roach and Suiter assigned to the plaintiff upon the termination or dissolution of said copartnership all rights of said copartnership in and to all moneys theretofore converted therefrom by said defendants and said Roach, as hereinbefore alleged. That at the time said sums of money were converted by said defendants and said Roach as hereinbefore alleged, and at the time of the dissolution of the said partnership and the settlement of its business and affairs between plaintiff and his copartners, the whole of said amount was in excess of the rights of said Suiter and Roach in said copartnership and in the money

and property belonging thereto. That upon the dissolution of said copartnership its business and affairs were settled as between this plaintiff and said Roach and Suiter, and the whole of said sum of money so wrongfully converted as aforesaid was due and owing and belonged to this plaintiff as a portion of his individual share of said copartnership property and money.

"(11) Plaintiff alleges that said defendants and said Roach actively co-operated in the conversion of said sums of money, and jointly acted in diverting the same from the said copartnership and from copartnership uses, and jointly converted the same to their own use and benefit, and to the damage of said copartnership and this plaintiff; and plaintiff therefore avers that the defendants are indebted to him on account thereof in the full sum of \$8,200.

"Wherefore he prays judgment against the said defendants for such sum, together with interest thereon, and for costs of suit."

Does this complaint state a cause of action against defendants? From a cursory reading of the same, doubts would naturally arise as to whether it was intended to state a cause of action in assumpsit, for conversion, or for damages for the misappropriation of funds of the partnership by defendants and Roach by reason of a fraudulent conspiracy between them for that purpose. But counsel for respondent have stated in their brief the theory upon which they rely for the sufficiency of their complaint, and therefore we shall consider only whether a cause of action is stated upon that theory.

Counsel for respondent say in their brief: "The right of the plaintiff to maintain this suit, as set forth in the amended complaint, is his personal right to recover damages in tort for the wrongs suffered by him individually in consequence of the fraudulent conspiracy of the defendants, and the acts done in pursuance thereof to the damage of the plaintiff. The damage for which he seeks redress is to him as an individual,—is for torts committed against him as an individual. It is the right of one who has suffered, through the wrongful acts of

others, to demand damages for the injuries done to him personally. The defendants, conspiring together with others, defrauded the plaintiff out of a large sum of money. The fact that plaintiff was a member of a copartnership of which Roach and Suiter were also members facilitated the carrying out of the conspiracy, and helped the conspirators to accomplish their design, which was to cheat and defraud the plaintiff. But it was not a partnership wrong for which plaintiff asks redress. He does not sue as assignee of a partnership wrong. The wrong is to him personally and individually, and that is the basis of his action."

One of the fundamental requisites of a good complaint in an action in tort for damages is that it must show by proper allegation that plaintiff was damaged by the acts of defendants complained of. It is perceived that by this complaint it is alleged that Riddell (plaintiff), Roach and Suiter formed a copartnership under the firm name of Riddell & Roach to construct the School of Mines building at Butte, Montana, under a contract with the state of Montana. There is no allegation that either copartner contributed any money or property to the copartnership, or that it had any assets except such as would arise in the performance of the contract for the erection of the building. The complaint further alleges that it was agreed between the copartners that these assets, when received, should be deposited with the Commercial National Bank of Bozeman, to be used only in payment for material and labor required in the erection of the building, except that each copartner might withdraw \$125 per month for living expenses; that the firm deposited large amounts of money with this bank subject to the above agreement, of which defendant Ramsey had knowledge, and to which he consented; that defendants and Roach, through a fraudulent conspiracy, withdrew from these assets so deposited and misappropriated the sum of \$8,200, and converted the same to their own use. It is apparent that the injury complained of was damages resulting from this alleged unlawful withdrawal of a portion of the partnership assets.

What was the interest and ownership of each partner in the firm assets? "Every partner owns the whole partnership property subject to equal ownership of every other partner; and no one partner can make his own ownership of any part absolute, or relieve it from the incumbrances of the ownership of the others, without their consent. \* \* \* But although no partner owns absolutely any part of the property, he has an interest in the whole." (Parsons on Partnership, Sec. 112.)

The individual interest of one partner in the firm assets can only be ascertained by a settlement of the partnership. (*Bopp v. Fox*, 63 Ill. 540; *Chandler v. Lincoln*, 52 Ill. 74; *Menagh v. Whitwell*, 52 N. Y. 146; 11 Am. Rep. 683; *Sindelare v. Walker*, 137 Ill. 43, 27 N. E. 59, 31 Am. St. Rep. 353.)

Such settlement can only be accomplished by agreement of the partners, or by an action in equity for an accounting settling their several interests. Plaintiff's injury, as above stated, is only claimed to arise from this alleged misappropriation. In order to be injured as an individual by this misappropriation, his complaint must show that he was the individual owner, or entitled to the possession, of the funds misappropriated at the time of the alleged misappropriation. The only allegations of individual ownership or right to possession of the funds alleged to have been misappropriated are found in paragraphs 8 and 10 of the complaint. In paragraph 8 it is alleged that neither the defendants nor Roach were entitled to any part of the money converted, and, had it not been converted, the whole thereof would have remained to plaintiff upon dissolution of the partnership, and would have belonged to him free from any claim of defendants or Roach. In paragraph 10 we find allegations to the effect that in March, 1897, Roach sold to plaintiff all his rights in and to the copartnership property, claims, demands and rights of action, and that the rights of Roach were fully settled and determined, and that plaintiff is the owner of all of Roach's right in the copartnership property; that on November 26, 1897, the copartnership was dissolved as to Suiter by mutual agreement between them, and Suiter transferred and as-

signed to plaintiff all his rights in the partnership and in and to all the accounts, claims, demands, rights of action and property belonging to such partnership, and that plaintiff is the owner of all the property, rights and claims theretofore belonging to the copartnership in which said Roach and Suiter had any interest as copartners; that Roach and Suiter assigned to plaintiff upon the termination and dissolution of the partnership all rights of said copartnership in and to all the moneys theretofore converted therefrom by defendants and Roach; that at the time of the alleged conversion and at the time of the settlement of its business and affairs between plaintiff and his copartners the whole of said amount was in excess of the rights of Roach and Suiter in said copartnership and in the money and property belonging thereto; that upon the dissolution of the partnership its business and affairs were settled as between plaintiff and Roach and Suiter, and that the whole sum of money converted was due and owing, and belonged to plaintiff.

Are these allegations sufficient to show that the plaintiff was individually the owner or entitled to the possession of the money alleged to have been misappropriated? From a reading of them one is led to believe that in the preparation of the complaint plaintiff's attorneys intended to rely upon an assignment and transfer to plaintiff by Suiter and Roach of all their rights of action in reference to the money alleged to have been misappropriated, or an assignment of all their rights in said fund. However, in their brief they distinctly say that they do not base plaintiff's rights upon such assignment and transfer. If they do not base plaintiff's rights upon such assignments or transfers, the allegations of the same in the complaint must be treated as surplusage. As a matter of law, plaintiff could not be vested with a right of action to recover the interests of Roach and Suiter in or to any of the funds so alleged to have been misappropriated by the assignment pleaded. According to the allegations of the complaint, Roach and Suiter are both guilty of misappropriation of copartnership funds. They therefore could not assign the right of action to recover such funds against them-

selves. No person can transfer to another a right of action against himself. The right of action now claimed by plaintiff is one based upon the fraudulent conduct of Suiter and Roach, concurred in by Ramsey. We cannot conceive how such right of action could, in the first place, rest in Suiter and Roach, because no one can have a right of action against himself. It is absurd to say that Roach and Suiter could transfer to plaintiff a right of action against themselves growing out of their own fraud and misappropriation. (*Hasselman v. Douglass*, 52 Ind. 252; *Van Scoter v. Lefferts*, 11 Barb. 140.)

In *Hasselman v. Douglas*, *supra*, the court said: "We are of opinion that the private accounts against the Douglasses and Conner in favor of the firm of Douglass & Conner were not such partnership assets as would pass, by the agreement, to Hasselman. These accounts represented what had been drawn out of the firm by the partners, and not debts due to the firm. Hasselman bought the interest which the three partners had in the partnership assets at the time of the purchase, not the assets they had previously drawn out of the firm; and the more they had drawn out the less would be the interest which Hasselman would take by his purchase. Besides, only the creditor can sell a debt. The debtor has no interest in it which he can transfer. In these accounts the Douglasses and Conner were the debtors; the firm of Douglas & Conner was the creditor. The firm sold nothing to Hasselman. It was a sale by the three partners of their undivided individual interests. They could not become their own creditors. As to the other choses in action due the firm, they sold their right in them as creditors, not as debtors. Each one sold his interest in the firm, which would be the share remaining to him after the payment of the partnership debts and the final settlement of the partnership affairs. A partner has no transferable interest in the property of a partnership to which, after its ultimate adjustment, he is indebted."

Roach and Suiter are alleged to have transferred all their interest in the copartnership funds and assets to plaintiff, and it is doubtless claimed that this includes their interest in the funds



misappropriated. They had no interest in such funds, under the allegations of the complaint, because they are alleged to have fraudulently withdrawn and converted the entire fund. They had received it all. The liability rested on them in favor of plaintiff to account to him for his share of the fund misappropriated, if such misappropriation was of more than their share in the partnership assets, for if, upon such accounting, it should be ascertained that they were entitled to this amount or more of the partnership assets, they would be accountable to no one because of the withdrawal. The liability to account was in the nature of a right of action, but such right of action was not one in their favor, but against them. It matters not, as to their liability, how they obtained this \$8,200. The taking in any manner, if they were not entitled to it, created a liability. If they were entitled to it, the manner of the taking is entirely immaterial.

There are only two ways under the law of partnership in which it can be determined that any liability existed on the part of Roach and Suiter, or either of them, to the plaintiff. One is by copartnership accounting in equity, and the other by a settlement of all partnership affairs by agreement of the partners. In the first case the amount of the liability must be found by and announced in the decree of accounting. In the other the amount must be fixed and stated in the agreement of settlement. The fact of liability and the amount thereof must be fixed and stated in either instance.

The complaint is utterly barren of any allegation that any accounting in equity has ever been had. It, however, alleges a settlement, but it fails to allege that upon such settlement any balance was found to be due from Roach or Suiter to the plaintiff. The settlement of partnership affairs in its broadest sense would include the settlement of all transactions between the partners relative to partnership affairs, and unless it is alleged that a balance was found to be due to one or the other of the copartners this court must presume that no such balance existed. No balance is alleged to have been found due from either Suiter

or Roach upon this settlement. The only allegations bearing upon this proposition are: "That neither of said defendants or said Roach were entitled to any part of said amount so withdrawn and converted by them, and that, had said sum not been withdrawn and converted to the aforesaid use, the whole thereof would have remained to the plaintiff upon a dissolution of said partnership hereinafter alleged, and would have belonged to him free from any claim or right of said defendants or said Roach." "That at the time said sums of money were converted by said defendants and said Roach as hereinbefore alleged, and at the time of the dissolution of said partnership and the settlement of its business and affairs between plaintiff and his copartners, the whole of said amount was in excess of the rights of said Suiter and Roach in said copartnership and in the money and property belonging thereto. That upon the dissolution of said copartnership its business and affairs were settled as between this plaintiff and said Roach and Suiter, and the whole of said sum of money so wrongfully converted as aforesaid was due and owing and belonged to this plaintiff as a portion of his individual share of said copartnership property and money." These allegations are mere conclusions of the pleader, and entirely fail as allegations of fact upon which an issue could be formed. If the allegations had been to the effect that upon a settlement of the copartnership affairs it was found and agreed that neither Roach nor Suiter had any interest in the funds so withdrawn, but that plaintiff was entitled to the whole thereof, a different aspect would have presented itself, but we find no such allegation.

Neither did the plaintiff, by the alleged purchase from Suiter and Roach, obtain an individual ownership of the funds so alleged to have been misappropriated. There is nothing in the allegations of the complaint tending to show that there was transferred to plaintiff by these purchases anything except whatever interest Roach and Suiter had in the partnership and property. If they had overdrawn their accounts as partners, or misappropriated a part of the partnership funds, their interests in

the partnership would be that much less than it would have been otherwise. It must be presumed, in the absence of anything tending to show the contrary, that when plaintiff became the purchaser of Roach's and Suitor's rights in and to the partnership he only became the owner of such rights as they then had. According to the allegations of the complaint, each was then indebted to the partnership, either by overdrafts, or misappropriation of partnership funds, or otherwise. It therefore follows that such transfers to plaintiff would only be of a balance of the interest which Suiter and Roach then had.

It must be presumed that all partnership accounts and transactions between the parties were settled and merged in the new agreement. (*Pierce v. Ten Eyck*, 9 Mont. 349, 23 Pac. 423; *Norman v. Hudleston*, 64 Ill. 11; *Johnson v. Wilson*, 54 Ill. 419; *Over v. Hetherington*, 66 Ind. 365; *Thompson v. Lowe*, 111 Ind. 272, 12 N. E. 476; *Roberts v. Ripley*, 14 Conn. 543; *Farnsworth v. Whitney*, 74 Me. 370; *Lesure v. Norris*, 11 Cush. 328; *Patterson v. Martin*, (6 Iredell) 28 N. C. 111; *Stoddard v. Wood*, 9 Gray, 90; *Woodward v. Winfrey*, 41 Tenn. 478; *Cobb v. Benedict*, 27 Colo. 342, 62 Pac. 222; *Hasselmann v. Douglass*, 52 Ind. 252; *Van Scoter v. Lefferts*, 11 Barb. 140; *Murdock v. Mehlhop*, 26 Iowa, 213.)

In *Pierce v. Ten Eyck*, *supra*, this court says: "Pierce contributed to the firm the sum of \$387.52 in excess of his share, and it was agreed that upon the dissolution of the copartnership this amount should be first deducted from the assets, and that the remainder should be divided equally between the parties. The sale by Ten Eyck to Pierce of his entire interest in the property of the firm worked a dissolution. *Rogers v. Nichols*, 20 Tex. 719. But we are of the opinion that the agreement did not contemplate a termination of the partnership in this way, and that Pierce, by his new bargain with Ten Eyck, which was a purchase without any reservation of demands, relinquished all claims of this class."

In *Over v. Hetherington*, *supra*, the court says: "The interest of a partner in the partnership property of his firm is his

share of what may be left of such property after the payment of the debts of the firm, and after the deduction therefrom of his indebtedness, if any, to his firm; for his copartners have a specific lien on his share of the assets of the partnership to secure his indebtedness to the firm, and in the ascertainment of his interest in the property of the firm his indebtedness thereto must be taken into the account, and settled out of his share. *Smith v. Evans*, 37 Ind. 526; *Donnellan v. Hardy*, 57 Ind. 393. When, therefore, as in this case, a partner makes a sale of his 'interest in the concern,' it must be presumed, we think, that he sells only his legal interest in the firm, and nothing more. It cannot be assumed, in such case, in the absence of any stipulation to that effect, that such partner sold, or intended to sell, if he could, his own indebtedness to the firm, or any part thereof. But it was alleged by the appellant that Berner fraudulently concealed his indebtedness to the firm, and that the appellant was ignorant of such indebtedness at the time of his purchase of Berner's interest. The appellant failed to allege what fraudulent acts were done by Berner in the concealment of his debts to the firm. It is well settled by the decisions of this court that when a party relies upon fraud as a ground for relief it is not enough for him to 'characterize the transaction as fraudulent by the simple use of that word. It is the office of a pleading to allege facts, not legal conclusions.' *Curry v. Keyser*, 30 Ind. 214; *Darnell v. Rowland*, 30 Ind. 342; *Ham v. Greve*, 34 Ind. 18, and *Joest v. Williams*, 42 Ind. 565, 13 Am. Rep. 377. The appellant did not claim that Berner kept the accounts of the firm. On the contrary, he alleged that English kept the books of the concern. He did not claim that Berner's indebtedness to the firm was not charged against him on the books of the firm; nor did the appellant allege that he did not have free access at all times to the firm's books. If the indebtedness of Berner to the firm appeared on its books, as we may assume that it did in the absence of any averment to the contrary, and if the firm's books were open at all times to the examination of the appellant, as we may assume they were in the absence of an averment to

the contrary, then it would seem that the appellant's alleged ignorance of the existence of Berner's indebtedness was the result of his own negligence, and inexcusable, and could not be pleaded by him as affording any ground of defense."

In *Thompson v. Lowe*, *supra*, the court uses the following language: "It may be taken as settled, too, that where one partner transfers his interest in the assets, including the book and accounts of the partnership, to a continuing member of the firm, or to another, and receives in payment for such interest the note of the purchaser, the maker of the note cannot set off an account apparently due the firm from the member whose interest was transferred. A sale by a partner of his interest in the assets of the firm does not, in the absence of a special agreement to that effect, imply that the purchaser becomes entitled to collect from the seller what may appear to be due from him on the firm books. *Over v. Hetherington*, 66 Ind. 365; *Hasselman v. Douglas*, 52 Ind. 252. The effect of such a sale is to transfer to the purchaser whatever interest the seller has in the assets of the partnership after the payment of all the partnership liabilities. In the absence of anything to show the contrary, it will be presumed that the account of the retiring member was adjusted in ascertaining the value of his interest, and that the value was increased or diminished in proportion as he was found the debtor or creditor of the firm. Where the purchaser agrees to pay the partnership liabilities, and also to pay the retiring partner a specified sum for his interest, the presumption will be, until the contrary appears, that the debts were ascertained, and that the sum agreed to be paid was the value of the retiring partner's interest, and that this included the adjustment of his own account with the firm, whether by such account he appeared to be debtor or creditor."

In *Farnsworth v. Whitney*, *supra*, the court says: "When the two members of which a firm is composed settle their partnership affairs and dissolve, and one of them takes an assignment of the other's interest in the partnership property, paying therefor a sum agreed upon by them, and assumes the payment of the

partnership debts, the effect of the arrangement is to extinguish the assignor's indebtedness to the firm. Such an arrangement implies that the assignor is to retain whatever he has already received from the firm, in addition to the consideration mentioned in the assignment. It is, in effect, an agreement that the sum paid is a balance due him after deducting what he has already received. No other rational interpretation can be put upon such an arrangement. It is impossible to believe that the one would pay or the other receive the sum agreed upon, unless all existing claims between them were to be thereby adjusted and settled. So held in *Lesure v. Norris*, 11 Cush. 328. In the case cited the partner's indebtedness had been charged upon the books of the firm. In this it had not. But we think this can make no difference in the result. A settlement operates as an accord and satisfaction of all indebtedness intended to be included in it, whether such indebtedness is evidenced by charges upon the books of the parties or not. The charges are only evidence of the indebtedness. The indebtedness may exist without the charges. And when the evidence is satisfactory that the parties intended a full and complete settlement of all their affairs, it will operate as an accord and satisfaction of indebtedness which is not charged as well as that which is."

In *Lesure v. Norris*, *supra*, the court says: "The sale to the defendant, under the circumstances stated, was a dissolution of the copartnership. *Taft v. Buffum*, 14 Pick. 322. It was also, in effect, an adjustment by the partners, as between themselves, of all its concerns, and a division and appropriation of everything belonging to it. Nothing further remained to be done to effect a complete settlement between themselves. By the bill of sale the plaintiff transferred all his interest in the company property, including debts which were due, to the defendant, and the latter thereby became sole owner of the whole. The interest which any partner has in the effects, rights and credits of a solvent partnership is the share or proportion of them which he will be entitled to receive upon a final adjustment and liquidation of its concerns. Whatever stands properly charged to him on the

company books, whether it be regarded as a debt due, or, perhaps, more correctly, as evidence that he has withdrawn already a certain amount of the capital invested or of the profits earned, is first to be deducted, and will, to that extent, diminish the share he is to receive. His interest in the concern is only the balance remaining after such deduction has been made. The balance, therefore, is what was conveyed to the defendant by the bill of sale executed by the plaintiff. It was his interest in the company property, and that was his share of its assets which remained after deducting the amount charged to him on the books of Norris and Lesure. That charge was extinguished by the transaction between the parties, because it was, in effect, an entire adjustment of it. There was no occasion, therefore, to make any entry upon the books in relation to the amount, because the general liquidation and settlement rendered attention to its details unimportant and immaterial. It is not pretended that there was any particular assignment of the amount in question to the defendant, and it clearly did not pass as any part of the interest of the plaintiff in the assets of the company."

In *Stoddard v. Wood*, *supra*, the court says: "This note was given for money drawn by the defendant out of the partnership of which he was a member, and for no other consideration; and was indorsed when overdue, after the dissolution of the partnership, to a partner having full knowledge of all the facts, and therefore standing on no better ground than the indorsers. This note, given as it was, constituted an item of debit in account, for which no action lies. It was not a debt to the firm. The difficulty of maintaining an action by a partnership against one partner is not merely a matter of parties, arising out of the difficulty of bringing suit. It lies much deeper. A promise by a partner to the partnership is a promise to pay himself with other persons, and it cannot be said that anything is due until the whole is settled, until all the assets are collected, and all debts paid. Until then it cannot be known whether there is any balance due; still less, what that balance is."

In *Woodward v. Winfrey*, *supra*, the court says: "The in-

strument, upon its face, purports to be a 'compromise of all the matters now [their] in dispute between the parties.' The paper must therefore be taken as at least *prima facie* evidence that the results herein stated were the final results of the ascertained rights of the respective partners, based upon a calculation or estimate comprehending all matters connected with or arising out of the whole partnership business, as well between the partners themselves as between the firm and third persons. Such, we think, is the plain import of the written instrument; and such also is the presumption of law. It cannot be supposed that in an adjustment professing to be a full and final one, and so intended to be by both parties, and brought about with so much pains and labor, so large and important an item would have been overlooked; and still less can it be supposed that Winfrey would have agreed to pay Woodward the sum of nearly \$1,800, and let a decree be rendered against him for it, without claiming an abatement of that amount to the extent of Woodward's account, if it had been understood to have been transferred to him, and without once requiring any explicit evidence whatever of such a claim on Woodward. This is not to be believed."

We are satisfied, under the above authorities, that the allegations of plaintiff's complaint are not sufficient to show that he was the individual owner or entitled to the possession of the moneys alleged to have been misappropriated.

The only injury which could possibly result to plaintiff from the acts of misappropriation would be that plaintiff's interest and ownership in the property, assets and funds of the copartnership had been affected and reduced. How can it be said that the misappropriation of a portion of the funds of a partnership is an injury to one partner's individual interest therein until after a final accounting, either by way of a bill in equity for such purpose or by the specific agreement of the partners, has been had between the partners, and it has been determined that such funds belonged to such partner?

The case of *Sindelare v. Walker*, 137 Ill. 43, 27 N. E. 59, 31 Am. St. Rep. 353, is illustrative of this proposition. That



was a suit brought by one partner against his copartner and a third person, based upon the ground of collusion and fraud, whereby the entire assets of the copartnership were diverted. The allegations of the complaint were, in substance, that plaintiff and Hubka were partners in the dry goods business, owning a stock of goods and certain store fixtures, on which they had previously executed a chattel mortgage to defendants; that long before the maturity of this chattel mortgage, and without any authority of law whatever, defendant, by collusion with Hubka, wrongfully foreclosed the mortgage and took possession of not only the goods and chattels described therein, but also others of the value of \$5,000, belonging to said firm, which he afterwards pretended to sell to Hubka; that by reason of such wrongful transfer plaintiff was deprived of his said goods and profits and the good will of said business; that said wrongs were committed in consideration of the confederation and collusion of said Hubka and defendant to injure and defraud plaintiff. There was no averment that the copartnership between plaintiff and Hubka had been dissolved, or any settlement had of their partnership affairs. The court says: "The declaration, therefore, not only fails to show any individual title or ownership in plaintiff to said property, partnership business or the profits or good will thereof, which he says he lost, but affirmatively discloses a state of facts from which it appears that he had only a community of interest therein with his partner, who consented to said transfer and all that was done by defendant in error. A partner's right to partnership property is an ownership of all the assets of the firm, subject to the ownership of every other copartner, all of the partners holding all of the firm assets subject to the payment of the partnership debts and liabilities. Parsons on Partnership, 350. It is clear, therefore, that the individual interest of one partner in the firm property and business can only be ascertained by a settlement of the partnership. *Bopp v. Fox*, 63 Ill. 540; *Chandler v. Lincoln*, 52 Ill. 77; *Menagh v. Whitwell*, 52 N. Y. 146, 11 Am. Rep. 683. This rule applies to the interest of a partner in the profits or good

will of the partnership business as well as to the tangible assets of the firm. Until plaintiff's actual interest in the partnership has been determined, there can be no ascertainment of his damages. *Buckmaster v. Gowen*, 81 Ill. 153; *Sweet v. Morrison*, 103 N. Y. 235, 8 N. E. 396. We are clearly of the opinion that on the facts stated in his declaration plaintiff has no standing in a court of law."

The case of *Sweet v. Morrison*, 103 N. Y. 235, 8 N. E. 396, is also illustrative of this subject. In this case Sweet's (plaintiff's) partners made a settlement of their business dealings with another partnership without the consent of Sweet, and against his protest. He brought an action to set aside the settlement and recover the amount of money which he claimed was due to him as a copartner in the business transactions which were settled by his copartners. The Supreme Court of New York held that he had not proved any loss, and further said: "It cannot be known, until a settlement of the partnership accounts, what loss has resulted from the fraud. Payson, Canda & Co. are not bound to pay Sweet's firm or Sweet's partners anything. Primarily the action is by Sweet against his copartners for a partnership settlement, in which he charges them with the willful and fraudulent waste of a valuable claim, and holds the debtors responsible also by reason of their collusive participation. That is the sole theory upon which the action can be maintained. To Sweet's partners and to his firm nothing is due from Payson, Canda & Co., and they can be compelled to pay only what is needed to perfect Sweet's rights as disclosed by an honest settlement. He has a right, notwithstanding the settlement actually made, to be placed in the position he would have been in if the full debt had been honestly paid to his copartners and he had received his aliquot share of the assets thus increased, after payment of the firm debts. When that is done, he has obtained full justice, and all to which he is entitled. But as the case stands his recovery may prove to be much too large or much too small. No final settlement of the firm accounts has been had, and every effort to prove their exact condition was prevented by the rulings

upon the trial. It may turn out that, even after charging the four partners with the entire amount of the disputed asset, Sweet has already had his full share, and is entitled only to judgment confirming him in its possession. In that event Payson, Canda & Co. would have nothing to pay. If it should appear that the firm debts are all paid, or, if not, that the four partners are so solvent and able to pay their proportions as to permit that subject to be disregarded, and that Sweet has already had from the firm property in excess a sum equal to one-quarter of the disputed claim, then the sole relief necessary to his protection is a judgment confirming him in the possession of what he has received. His partners claim that to be the truth; that he took in advance, and over and above his share, all this asset would produce; and, having got it already, has no claim to be paid it a second time. On the other hand, that claim of the four partners may prove to be untrue, and it may further appear that large debts are outstanding, for which Sweet is liable, and, at least, if his partners are insolvent, and unable to pay, and all the other firm property is exhausted, he may require from Payson, Canda & Co. a sum sufficient to restore the solvency of the firm, and secure him his share of the surplus, even if it took much more than the sum he has already recovered. In other words, whatever loss of Sweet on a final adjustment of the partnership accounts can be traced to the waste of the disputed assets by his partners in collusion with Payson, Canda & Co. must be made good to Sweet out of it. But when that is done full justice is rendered, and he is entitled to no more."

This complaint does not contain any allegation of an accounting between the partners of the partnership business, either in equity or by agreement, or that upon such accounting the moneys alleged to have been converted were found and agreed to belong to the plaintiff. It is therefore insufficient, and we advise that the judgment appealed from be reversed.

PER CURIAM.—For the reasons stated in the foregoing opinion, the judgment is reversed and the cause remanded.

MR. CHIEF JUSTICE BRANTLY, not having heard the argument, takes no part in this decision.

Application for an order modifying the foregoing opinion, denied December 23, 1904.

Rehearing denied January 16, 1905.

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MANTLE, RESPONDENT, v. CASEY ET AL., APPELLANTS.

(No. 1,930.)

(Submitted September 30, 1904. Decided December 1, 1904.)

*Process—Serving Complaint with Summons—Special Appearance—Effect on Time to Answer—Default—Striking Answer from Files—Setting Aside Default.*

1. Code of Civil Procedure, Section 635, provides that "a copy of the complaint must be served with the summons unless two or more defendants reside in the same county, in which case a copy of the complaint need only be served on one of such defendants." *Held*, that where several defendants reside in the same county, and a copy of the complaint is served on one of them with the summons, a return of service need not show that defendants all reside in the county.
2. Where all the defendants in an action to quiet title, residing in the same county, were served with summons, and one defendant was served with a copy of the complaint as required by Code of Civil Procedure, Section 635, the fact that such defendant filed a disclaimer of any interest in the land did not affect the service on the other defendants; there being nothing to show that he was not made a defendant in good faith.
3. Under Code of Civil Procedure, Section 1020, providing that "if no answer has been filed within the time specified by the summons, or such further time as may have been granted, the clerk must enter the default of defendant," a special appearance for the purpose of moving to quash the service of summons did not extend the time for a general appearance and answering to the merits.
4. An answer filed after defendant's default for failure to answer has been entered will be stricken from the files; the proper practice being to move to set aside the default, tendering the answer with the motion.
5. The failure of defendant's counsel to know that a special appearance to move to quash the service of summons did not extend the time for a general appearance and answer, is not such surprise or excusable neglect as is contemplated by Code of Civil Procedure, Section 774, as a reason for setting aside a default.

MR. JUSTICE MILBURN dissenting.

*Appeal from District Court, Silver Bow County; E. W. Harney, Judge.*

ACTION by Lee Mantle against George H. Casey and others. From a judgment for plaintiff, defendants appeal. Affirmed.

*Mr. Miles Cavanaugh, Messrs. Forbis & Mattison, and Messrs. McBride & McBride, for Appellants.*

*Mr. Jesse B. Roote, Mr. Frank W. Haskins, and Mr. E. B. Howell, for Respondent.*

MR. COMMISSIONER CLAYBERG prepared the following opinion for the court:

This is an appeal from a judgment entered in the court below upon the default of defendants for not appearing and answering summons.

Error is charged in the ruling of the court denying a motion to quash service of summons, in allowing default to be entered pending this motion, in striking defendants' answer from the files, in refusing to set aside the default, and in entering the judgment. The judgment roll, with the proper bill of exceptions, constitutes the record upon appeal.

The chronological order of the various steps in the court below is as follows: On December 9, 1902, Mantle filed a complaint against George J. Casey, F. T. McBride, T. M. Hodgens, Lulu Largey, James M. Forbis and Charles Mattison, for the purpose of quieting his title to the south fifty feet of lots 1, 2, 3 and 4 of block 17, in the original townsite of Butte. Summons was issued and served upon defendants McBride, Casey, Forbis and Mattison on December 9th. A copy of the complaint was served upon McBride alone. Summons was served on defendant Hodgens on December 10, 1902, and returned as to the defendant Largey as not found. On December 27, 1902, defendants Hodgens and McBride severally filed their disclaimers, and alleged that they had no interest in the property described in the

complaint. On December 29th defendants Casey, Forbis and Mattison filed a motion to quash the service of summons "for the reason that same was not served in accordance with the provisions of Section 635 of the Code of Civil Procedure of the state of Montana, and said service was not made as required by the laws of Montana." This motion was based upon the return of the sheriff indorsed upon said summons, and the papers and records of the case. It was noticed for hearing on January 5, 1903. On this date the court continued the hearing until January 10, 1903. On January 9, 1903, plaintiff's attorneys filed a præcipe with the clerk for the entry of default of defendants Casey, Forbis and Mattison for "having failed to either appear or answer the complaint within twenty days after service of summons," and default was duly entered on the same day. The hearing of the motion to quash the service of summons was continued until the 24th day of January, 1903, when it was argued and submitted. The court took the same under advisement until February 10, 1903, when the motion was denied. After the motion to quash was denied, and after the entry of their default, defendants Casey, Forbis and Mattison served and filed their separate answer. On the 11th day of February, 1903, plaintiff applied to the court to set the time for hearing proofs on the said default, and the defendants Casey, Forbis and Mattison gave notice of intention to move the court to set aside the default, and that matter was taken under advisement by the court. On the 12th day of February, 1903, counsel for plaintiff moved to strike said defendants' separate answer from the files, and the said defendants Casey, Forbis and Mattison moved the court to set aside the default entered against them. All these matters were then set by the court for hearing on the 18th day of February, 1903. This hearing was postponed to February 25, 1903, and on that day defendants Casey, Forbis and Mattison filed their amended motion to set aside the default, which was supported by affidavits of James W. Forbis, John Lindsay, George Casey and F. T. McBride. The amended motion was set for hearing on the 3d day of March, 1903. On this last-named day

the affidavit of E. B. Howell was filed by the plaintiff in opposition to the affidavits filed by defendants upon the motion to set aside the default. The motion to set aside the default was argued on the 3d day of March, and taken under advisement by the court. Afterward, and on the 4th day of March, at a time when defendants and their attorneys were absent from the court, the court made an order by which it overruled the motion to set aside the default, and sustained the motion to strike defendants' answer from the files. On the 14th day of March, 1903, the court, after hearing plaintiff's proof, entered judgment in favor of plaintiff according to the prayer of the complaint.

1. Motion to Quash the Service of Summons. Section 635, Code of Civil Procedure, provides that "a copy of the complaint must be served with the summons, unless two or more defendants are residents of the same county, in which case a copy of the complaint need only be served upon one of such defendants."

The return of the sheriff shows that he served the summons upon defendants Casey, Forbis, Mattison and Hodgins, and that he served the summons and a copy of the complaint on defendant McBride. The service upon all these defendants having been made in the same county, the return of the sheriff was not required to show that they were all residents of that county. In the absence of a showing to the contrary, it is presumed that they were. (*Calderwood v. Brooks*, 28 Cal. 151; *King v. Blood*, 41 Cal. 314; *Pellier v. Gillespie*, 67 Cal. 582, 8 Pac. 185.)

The service was therefore sufficient as to defendants Casey, Forbis and Mattison, if McBride was a proper party defendant. Appellants insist that he was not. Section 581, Code of Civil Procedure, provides that "any person may be made a defendant who has or claims an interest in the controversy adverse to the plaintiff." The action was one to quiet title, and the allegations of the complaint as to all of the defendants are, "on information and belief, that defendants wrongfully claim some interest or estate in said real estate and premises belonging to plaintiff adverse to plaintiff." Appellants insist that defendant McBride was not a proper party defendant, because on the 27th day of

December, 1902, he filed a disclaimer of any interest in the premises, and that therefore the service of a copy of the complaint on him was insufficient for service of summons on the other defendants. A portion of this disclaimer seems very pertinent to the matter under consideration. It is as follows: "Denies that he claimed any estate or interest in said property at the time of the commencement of this suit or at any time since." He may have held or claimed such interest prior to the commencement of the suit and prior to the preparation of the complaint; hence he could have properly been made a party defendant under the statute.

We recognize the doctrine that a party will not be allowed to make persons parties to a suit, who are not necessarily or properly defendants, for the fraudulent purpose of gaining jurisdiction over the matter involved, in a particular court, and thus obtaining the right to serve summons upon defendants in other counties who are proper parties, as is disclosed by the cases cited in appellants' brief. The record contains no intimation of bad faith on the part of respondent, or of any fraudulent intent on his part to compass the purposes indicated in appellants' authorities or otherwise. He may have believed, and doubtless did believe, that defendant McBride was a proper party defendant. It was quite important, in this character of suit, to bring in as defendants all persons who claimed an adverse interest in the premises, so that plaintiff's title might be fully quieted in the one suit. He would obtain as substantial relief against any defendant disclaiming any interest in the property as he would by final decree against those who contested the suit. McBride was a party defendant, and the summons issued upon the filing of the complaint was delivered to the sheriff for service. Section 635 was the sheriff's guide as to the manner in which service was to be made. He followed the statute. The statute was not intended to impose the burden upon a sheriff of selecting a defendant who is a proper party, upon whom to serve the copy of the complaint. In cases within the exception provided in Section 635, Code of Civil Procedure, he may serve a



copy of the complaint upon any defendant named therein. We are satisfied that the service of summons was regular in every regard, and that the court committed no error in overruling the motion to quash.

2. The Entry of the Default. Counsel for appellants strenuously contend that the motion to quash the service of summons, and the special appearance of certain defendants for that purpose, prevented the entry of the default of such defendants for want of appearance or answer in obedience to the summons. In other words, they contend that the special appearance on the motion to quash the service of summons extended the time for general appearance and answer until such motion was disposed of. We cannot agree with this contention.

Under the statute (Section 632), summons must be directed to the defendants, which must command them to appear "within twenty days after the service of this summons, exclusive of the day of service; and in case you fail to appear or answer judgment will be taken against you by default for the relief demanded in the complaint." Section 1020, Code of Civil Procedure, provides: "Judgment may be had if the defendant fails to answer the complaint, as follows: (1) \* \* \* (2) In other actions, if no answer has been filed with the clerk of the court within the time specified in the summons, or such further time as may have been granted, the clerk must enter the default of the defendant; and thereafter the plaintiff may apply to the court for the relief demanded in the complaint."

Here is a positive statutory provision requiring parties to answer the summons within twenty days after the date of service, and, if they do not do so, it is the duty of the clerk to enter their default. We find no statute which provides that the filing of a motion to quash service of summons shall operate as a stay of proceedings in the case; or as an extension of the time allowed by law to appear or answer after service of the summons. We find no case in any of the reported authorities under statutes like ours which holds such doctrine, and counsel for appellants, in their brief, seem to have been unsuccessful in that regard,

because no authority whatever is cited upon that particular point. On the other hand, however, we find authorities distinctly and unequivocally holding that a motion to quash service of summons does not extend the time to appear or answer. The most pointed case which has come under our observation upon this point is that of *Higley v. Pollock*, 21 Nev. 198, 27 Pac. 895. In that case the defendant made a motion to quash the service of summons, and failed to enter his appearance or answer in the case within the statutory time. The attorneys for plaintiffs caused his default to be entered. He afterward made a motion to open the default on the ground and for the reason that the default had been entered while the motion to quash the service of summons was pending and undisposed of. This was refused. The court, referring to the statute of Nevada as to the entry of default, and citing the cases of *Shinn v. Cummins*, 65 Cal. 98, 3 Pac. 133, and *McDonald v. Swett*, 76 Cal. 258, 18 Pac. 324, says: "The action of the judge of which the appellant complains was right. There having been no such appearance as the statute requires on the part of the defendant in the action, his default was properly taken." The cases of *Shinn v. Cummins* and *McDonald v. Swett*, cited by the court of Nevada, are also directly in point. See, also, the following cases: *Garvie v. Greene*, 9 S. D. 608, 70 N. W. 847; *Loring v. Wittich*, 16 Fla. 617; *Greenfield v. Wallace*, 1 Utah, 188. We therefore conclude that the default was properly entered, and that the motion to quash the service of summons did not extend the time for appearing or answering in the suit.

3. Striking the Answer from the Files. This answer was served and filed over a month after the default was entered. It was therefore irregularly on the files, and placed there without authority of law. With their default standing, they had no right to file any answer. The proper practice would have been to have made a motion to set aside the default and obtain leave to answer, tendering their answer with the motion. This is too clear to require a citation of authorities. In fact, counsel for appellants do not seriously press this alleged error.

4. Refusal to Set Aside the Default. The motion to effect this purpose was made on February 14th, and amended on February 25th. It recites that it was made "for the reason that at the time of the entry of said default by the clerk said defendants had appeared in said action, and there was then pending in said court a motion on the part of said defendants to vacate, set aside and quash the service of summons herein upon them, and said motion had not been disposed of at the time of entry of said default, and upon the grounds of surprise, inadvertence, and excusable neglect on the part of said defendants in not making further or other appearance in said action before said default was entered," and "upon the records of a meritorious defense at law in said action, if permitted to answer therein," and "upon the records of this court, and the affidavits of George H. Casey, John Lindsay, James W. Forbis and F. T. McBride, hereto attached." The bill of exceptions recites that the answer tendered with the motion was a duplicate of the one filed on February 11, 1903.

No such inadvertence, surprise or excusable neglect as is contemplated by Section 774, Code of Civil Procedure, concerning the want of appearance or failure to file answer within the time limited by statute, is shown in any of the affidavits; but it is disclosed that appellants' attorneys believed that, by the rules and practice of the trial court, the filing of the motion to quash the service of summons would prevent an entry of any default against them until such motion was decided by the court, and, if this decision was against the motion, the court would then permit them to answer. The attorneys make affidavit to this effect, and the affidavit of John Lindsay, an ex-judge of said court, was also presented, wherein it is stated that this had always been the practice of the court. No rules of court in that regard were shown, and no particular instance in which this procedure was followed. Defendant Casey sets forth that he was advised by his attorneys that no answer need be filed or appearance made until after the determination of this motion.

It is immaterial whether such practice had been recognized

or followed, or whether rules in that regard had been adopted. Courts cannot establish rules or recognize a practice which is contrary to that prescribed by the statute. Defendants' attorneys were charged with knowledge of the practice provided by this statute. Their failure to appear or answer was not caused by surprise, inadvertence or excusable neglect, but by a misunderstanding of the law. "*Ignorantia legis neminem excusat.*" A mistake in the law is not such excusable neglect, inadvertence or surprise as will be sufficient to set aside a default. (*Chase v. Swain*, 9 Cal. 130.)

5. The Entry of the Judgment. No errors can be alleged as to the entry of the judgment, other than those heretofore considered. The complaint stated a cause of action, and defendants did not appear in season. Their default was regularly entered, and an application made to the court for the hearing of plaintiff's proof, which was granted, and the proof heard. The judgment entered is in accordance with the prayer of the complaint, and no error can be predicated upon this entry.

Summons was served on the 9th day of December, 1902, on all the defendants who appeal. They did not move to quash the service of summons until on the 29th day of December—the last day allowed by the law for their appearance in the case. Had they acted speedily, and immediately made their motion, it might have been determined by the court prior to the expiration of the time for answer.

We do not find any error in the record, and therefore advise that the judgment be affirmed.

PER CURIAM.—For the reasons given in the foregoing opinion, the judgment is affirmed.

MR. JUSTICE MILBURN: I dissent. There are respectable authorities, it is true, which support the argument contained in the opinion, and the conclusion reached by a majority of the court. I cannot make myself believe that the conclusion is correct.

The summons and the statute declare to the defendant that judgment will be entered against him if he fail to appear and answer within the time fixed by law. If he appear within the twenty-day limit and demur—that is, demur to the complaint for want of jurisdiction of the court over any subject-matter—he simply, in effect, says: “Wait until the court decides whether or not I shall answer the complaint.” The court, because of pressure of other business, illness of the judge or his convenience, postpones making any decision upon the demurrer until, say, ten days after the expiration of the twenty-day period. Then it follows from the argument contained in the opinion, that the clerk must, under the statute, immediately upon the expiration of the twenty days enter the default of the defendant if asked by the plaintiff so to do; and if the court decide the demurrer adversely to the defendant, and he shall immediately file his answer, it may be, on motion, stricken from the files and judgment entered against the defendant for want of an answer. It will be said in opposition to this view that this filing of a demurrer is general appearance, and, to all intents and purposes, is an answer such as is contemplated in the Code when it says that the defendant shall appear and answer within twenty days. (Section 680, Code of Civil Procedure.) But the exact language of the Code as to summons and contents thereof is invoked in the opinion to support the view that a demurrer to the jurisdiction of the person involves a default and a judgment against the defendant, if he should have an adverse ruling after the expiration of twenty days after the service, upon his objection—that is, his demurrer—to the jurisdiction of the court over his person. If the clerk, who knows what the files, records and proceedings are, may not enter a default of answer because a demurrer is pending as to jurisdiction of the subject-matter, why should he enter a default of appearance while a demurrer to the jurisdiction of the person is pending and under consideration by the court? Each demurrer is allowed by law. Shall the clerk determine a question which the court is considering, and say there has been a service of summons, when the court is

trying to find out whether there has been or not? It is just as lawful to object—that is, *demur*—to the jurisdiction of the person, as it is to demur to the jurisdiction of the court over the subject-matter, and I cannot see any difference in logic in the two situations. If a man is to be punished for exercising his legal privilege in invoking the decision of the court upon the question: “Has the court jurisdiction over me?”, why shall he not be punished for invoking the court’s decision upon the question: “Has the court any jurisdiction over the subject-matter in this case?” The position taken in the opinion, I think, is this: If the party sued enter his special appearance within the twenty days, and in good faith pray the decision of the court upon the important question whether he is obliged by the law to appear and defend, and he do this, and the court shall, on account of pressure of other matters pending, postpone the hearing on the defendant’s motion to quash, and do not decide until after the expiration of the twenty-day period, the plaintiff may have default entered by the clerk ministerially, and leave the defendant without remedy in what is, perhaps, an iniquitous suit. In other words, the judge, speaking for the court, practically says: “Wait awhile, and, it being *my duty under the law to decide the question of jurisdiction*, I will let you know whether you must appear and answer; and if, for my own convenience, I wait until after the expiration of the twenty days, default may be entered against you meantime by the clerk, and, if so, I shall not open it, and any answer you file I shall strike from the files.”

The Supreme Court of North Dakota impliedly animadvert upon forcing a party “to defend, or take the risk of being defeated on the question of jurisdiction after it was too late to be heard on the merits.” (*Miner v. Francis & Southard*, 3 N. D. at page 552, 58 N. W. 344.)

It has been suggested to me that the defendant, if he do not wish to put himself into such an unfortunate predicament, should, at the time he makes his special appearance, objecting and demurring to the jurisdiction of the court over his person, ask for and obtain an extension of time within which to answer;

in other words, should make two motions—one to quash for want of jurisdiction, and the other for an extension of time within which to answer. The latter motion would be a general appearance and a waiver of the objection to the jurisdiction, in my opinion; so that this he may not do.

It is not necessary to cite authorities in support of the proposition that, "by appearance to the action for any other purpose than to take advantage of the defective execution or nonexecution of process, a defendant places himself precisely in the situation in which he would be if process were executed upon him, and he thereby waives all objection to the defective execution or nonexecution of process upon him." (*Layne v. Ohio River R. Co.*, 35 W. Va. at page 443, 14 S. E. 125.) The facts in the case cited are not like those in the case before us, but I hardly think that the proposition will be denied.

The conclusion to be drawn from the opinion is that, if the defendant be not absolutely certain that the court has not jurisdiction of his person through legal service of summons, he must appear or take the risk of a default without remedy. I am loath to believe that such a trap is laid by law for citizens. If so, it is time to change the law. If the defendant be absolutely certain that the court has not any jurisdiction, of course he need not appear. If he invoke the law, as settled by the courts giving him the privilege of special appearance, to find out surely if he must appear and answer, then he is likely to discover that he has been led by the law into his own undoing. The opinion settles it that it is extremely dangerous to civilly and lawfully ask the court to hear and determine a motion which under the settled law of this state one has a right to make, and which it is the duty of the court to determine before the case shall proceed. Why should a defendant be given by law an opportunity to invoke and the privilege of invoking the decision of the court as to whether he must appear and answer, if, pending the rendering of the decision, the clerk may enter a default, and the defendant be prevented from filing an answer immediately upon the ren-

dering of the decision of the court telling him that he is required to answer?

I think that the court erred in striking the answers from the files, and in not opening up the default which the clerk entered while the court was considering the question whether or not he should answer at all. The answers were filed immediately after the court informed the defendant that he should answer; that is, after he overruled the motion to quash.

For the reasons hereinbefore stated, I respectfully dissent.

Rehearing denied January 16, 1905.



CASES DETERMINED  
IN THE  
SUPREME COURT

AT THE  
DECEMBER TERM, 1904.

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THE HON. THEO. BRANTLY, Chief Justice.

THE HON. GEORGE R. MILBURN,  
THE HON. WILLIAM L. HOLLOWAY, } Associate Justices.

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COMMISSIONERS:

HON. JOHN B. CLAYBERG,  
HON. LEW. L. CALLAWAY,\*  
HON. W. H. POORMAN.  
HON. HENRY N. BLAKE.\*\*

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\*Resignation took effect January 1, 1905.  
\*\*Appointed January 2, 1905.

IN RE DAVIS' ESTATE.  
ROOT ET AL., APPELLANTS, V. LEYSON, ADMINISTRATOR,  
RESPONDENT.

(No. 1,939.)

(Submitted September 28, 1904. Decided December 8, 1904.)

*Administrator's Account — Sufficiency — Attorney's Fees—  
Amount.*

1. An administrator cannot charge the estate with expenses incurred in advising with counsel with respect to interests and demands antagonistic to the claims of the heirs when he knows that such counsel is representing the antagonistic interests.
2. Where attorneys were retained generally, and represented the estate in all litigation for several years, the administrator's account for the amount paid such attorneys is sufficiently itemized by giving the dates of the commencement and close of such services, with the gross amount.
3. Evidence in support of an administrator's account held sufficient to sustain the allowance to an attorney for the estate of \$12,500 for two and one-half years' services.
4. The purpose of the intermediate accounts of an administrator being to inform the court and persons interested as to the receipts, disbursements and changes in property, if any, the administrator need not charge himself therein with the appraised value of the entire estate.

*Appeal from District Court, Silver Bow County; E. W. Harney, Judge.*

TO THE account of John H. Leyson, administrator of the estate of Andrew J. Davis, deceased, Henry A. Root and others filed objections. From an order allowing the account, the objectors appeal. Affirmed.

*Mr. M. S. Gunn, and Mr. Charles R. Leonard, for Appellants.*

*Messrs. Forbis & Mattison, for Respondent.*

MR. COMMISSIONER POORMAN prepared the following opinion for the court:

This is an appeal from an order of the district court allowing an account of the administrator. In July of 1902 John H. Leyson, administrator with the will annexed of the estate of Andrew J. Davis, rendered and presented for settlement and filed in the district court his seventh annual account of his administration of said estate. Afterwards, in August, 1902, Henry A. Root, Ellen S. Coram, Henry A. Root, administrator of the estate of Sarah Maria Cummings, deceased, and Joseph A. Coram, being parties in interest in the said estate, and a part of the distributees thereof, filed in the court their certain objections in writing to this account, and a hearing was had thereon. At the hearing many of the items objected to were withdrawn,

and the only ones remaining to which objection is here urged are those of \$1,250 paid by the administrator to E. N. Harwood "for legal counsel," and \$12,500 paid by him for attorney fees to Forbis & Mattison. Objection is also made to the account as a whole, on the ground that it is not sufficiently itemized to show the condition of the estate. In December, 1902, the court made an order allowing the account so far as it related to the items not withdrawn, and from this order the objectors appeal.

1. The facts connected with the Davis estate have been so many times stated by this and other courts that a detailed statement is not here deemed necessary. The student of these matters will find a full narrative of them by referring to the following cases: *In re Davis' Estate*, 11 Mont. 1, 27 Pac. 342; *Id.*, 11 Mont. 196, 28 Pac. 645; *Id.*, 11 Mont. 216, 28 Pac. 650; *Id.*, 15 Mont. 347, 39 Pac. 292; *Id.* 27 Mont. 235, 70 Pac. 721; *Id.*, 27 Mont. 490, 71 Pac. 757; *Harris, Adm'r, v. Root et al.*, 28 Mont. 159, 72 Pac. 429; *Davis v. Davis et al.*, (C. C.) 89 Fed. 532; *Ingersoll v. Coram et al.*, (C. C.) 127 Fed. 418.

It is sufficient for the purpose of this appeal to say that John A. Davis, the proponent of the will, died pending the contest, and his son, John E. Davis, was appointed administrator of his estate. Erwin Davis had in the meantime made an agreement with John A. Davis, under the terms of which Erwin was to receive one-half of the estate which should pass to John A. Davis under the will, and under the provisions of the will practically the entire estate was to go to John A. Davis. A compromise agreement was subsequently entered into, under the terms of which a certain part of the estate was to go to the heirs of John A. Davis, and the balance of the estate was to go to the heirs of Andrew J. Davis other than Erwin. John H. Leyson is administrator of the latter estate. E. N. Harwood was and is the counsel for Administrator John E. Davis, and Forbis & Mattison were and are the counsel for Administrator Leyson. The specific objection made to the item of \$1,250 claimed to have been paid E. N. Harwood as counsel fee is that the evidence does not dis-

close that it is a proper charge against the estate, and that the same is not sufficiently itemized in the account. The litigation to which reference is made in the record are the cases above referred to as reported in the 27th Montana (70 and 71 Pac.), 28th Montana (72 Pac.), 89th Federal and 127th Federal.

In this litigation Judge Harwood represented interests not in accord with the agreement whereby the will was probated, and under which the distributees of the estate of Andrew J. Davis claimed, but directly antagonistic to the claims and demands of some or all of these distributees as to their distributive shares in the estate. And this litigation continued for years, and, still continuing, covers nearly every phase of the Davis estate. This fact alone is sufficient to prevent recovery of this item of expense. An administrator cannot charge an estate with expense incurred in advising with counsel who he knows is at the time representing interests and demands antagonistic to the claims of the heirs, as such, and with respect to those very interests. He cannot in any case or in any manner, either by advice or otherwise, litigate any claim or demand of one legatee or heir at the expense of the estate (*In re Dewar's Estate*, 10 Mont. 422, 25 Pac. 1025), for this would be compelling a legatee or heir to pay for the institution and maintenance of litigation directed against himself; and this principle applies to litigation of matters in difference between parties who are not heirs or legatees and those who are. The administrator may make himself personally liable, but he cannot be permitted to charge the same back to the estate. On question of allowance of attorney's fees, see *Royer's Appeal*, 13 Pa. St. 569; *In re Archer's Estate*, (Sur.) 23 N. Y. Supp. 1041; *In re Byrne's Estate*, 122 Cal. 260, 54 Pac. 957; *Wysong v. Nealis*, 13 Ind. App. 165, 41 N. E. 388; Woerner's Amer. Law Administration, 2d Ed., Sec. 515; *Estate of Page*, 57 Cal. 238.

2. The objection made to the item of \$12,500 paid to Forbis & Mattison is that it is not sufficiently itemized in the account filed, and that it is not supported by the evidence. The statement in the account of the administrator is: "By Forbis &

Mattison, atty. fees from Nov. 1st, '99, to May 1st, '02 (2½ years) \$12,500." It appears from the record and is admitted that Forbis & Mattison were the regular attorneys for this estate. It is therefore presumed that they appeared for the administrator in all matters of litigation requiring an attorney, and that they counseled him on all matters in which he required counsel. The account is for a definite term, and, we think, sufficiently itemized, taking into account the circumstances of this estate as appears from the record. The evidence supporting this account is to the effect that the condition of the estate occupied the entire time of an attorney, and the mass of litigation, involving various phases of this estate, tends strongly to corroborate this evidence. It is in evidence in this cause that nearly every step in the administration of this estate involved litigation in some form. An attorney and counsel fee of \$5,000 per year in an estate of this magnitude, involving all this litigation—a continued succession of conflicting claims and interests—is not unreasonable, and we cannot say that the court abused its discretion in allowing this claim. We think the action of the court with respect thereto should be sustained.

3. It is also objected that the administrator, in the account filed, has not charged himself with the appraised value of the entire estate, but has simply given a statement of the receipts and disbursements of money since his last report. We are inclined to adopt the view of counsel for respondents that these intermediate accounts are only to inform the court and the interested parties of the receipts and disbursements and changes in the property from time to time, and it is not the intention of the law that the administrator should in every account give a full inventory of the assets of the estate. This properly belongs to the inventory which is filed, except the actual cash on hand, which the law appears to contemplate he should carry forward in his several accounts rendered to the court. The account filed in this case, we think, complies sufficiently with the requirement of Sections 2780 *et seq.*, Code of Civil Procedure.

We think this order should be reversed so far as it relates to

the allowance of this item of expense for the \$1,250 paid for counsel to E. N. Harwood, and that otherwise the order should be affirmed.

PER CURIAM.—It is ordered that the cause be remanded to the district court, with direction to that court to modify its order approving the account of the administrator by striking therefrom the item of \$1,250 allowed as for counsel fees paid by the administrator to E. N. Harwood, and, as so modified, that the order be affirmed.

*Modified and affirmed.*

Rehearing denied January 16, 1905.

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JOHNS, APPELLANT, v. BARNES, RESPONDENT.

(No. 2,103.)

ON MOTION TO DISMISS APPEALS.

(Submitted December 7, 1904. Decided December 8, 1904.)

*Appeal — Dismissal — Transcript — Filing — Undertaking—  
Orders.*

1. Appeal from a judgment will be dismissed, the record not containing a copy of the judgment, as required by Code of Civil Procedure, Section 1736, or showing that judgment has been entered, as required by Section 1722, as amended by Session Laws 1899, p. 146.
2. By express provision of Code of Civil Procedure, Section 1724, omission to file an undertaking in support of an appeal, as there provided, renders the appeal ineffectual for any purpose.
3. An order overruling a motion to reject findings made by the jury is not appealable, not being among the orders enumerated in Code of Civil Procedure Section 1722, as amended by Session Laws 1899, p. 146, from which appeals are allowed.

*Appeal from District Court, Fergus County; E. K. Cheadle,  
Judge.*

ACTION by T. J. Johns against Clarence E. Barnes. From an adverse judgment and order, plaintiff appeals. Dismissed.

*Messrs. DeKalb & Ayres, and Messrs. Huntoon, Worden & Smith, for Appellant.*

*Messrs. Blackford & Blackford, for Respondent.*

MR. CHIEF JUSTICE BRANTLY delivered the opinion of the court.

The transcript on file in this cause shows that the plaintiff has attempted to appeal from a judgment entered against him in the district court, and also from an order overruling a motion to reject certain findings made by the jury. Respondent has interposed a motion to dismiss the appeal from the judgment, on the grounds, among others, that the transcript contains no copy of the judgment, and that no undertaking on this appeal was filed with the clerk of the district court. He also moves to dismiss the appeal from the order on the ground that it is not appealable. The motion must be sustained.

To support an appeal from a final judgment, it must not only appear that the judgment has been entered (Section 1722, Code of Civil Procedure, as amended by Session Laws 1899, p. 146), but the record must contain a copy of it (Code of Civil Procedure, Section 1736). The record before us contains nothing which purports to be a copy of the judgment. It does not even show that any judgment has been entered. (*Lisker v. O'Rourke*, 28 Mont. 129, 72 Pac. 416, 755.) It also appears affirmatively from the showing made by respondent that no undertaking in support of this appeal was ever filed with the clerk of the district court. This omission renders the appeal ineffectual for any purpose. (Section 1724, Code of Civil Procedure.)

Touching the attempted appeal from the order, it is sufficient to say that this order is not among those enumerated in Section 1722 of the Code of Civil Procedure, as amended by the Act of

1899, *supra*, from which appeals are allowed. Hence it is not appealable. Let the appeals be dismissed.

*Dismissed.*

MR. JUSTICE MILBURN and MR. JUSTICE HOLLOWAY concur.

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STATE EX REL. CLARK, RELATOR, v. DISTRICT COURT  
ET AL., RESPONDENTS.

(No. 2,085.)

(Submitted October 29, 1904. Decided December 8, 1904.)

*Jury—Making Jury List—Regularity—Who May Question—  
Time of Service.*

1. A member of a jury commission, who, by his own misconduct in office as a member of such commission, has rendered the making of the jury list so irregular that as to others it might be invalid, cannot take advantage of his own wrongdoing when called on to answer a criminal charge presented by a grand jury selected from such jury list.
2. Under Code of Civil Procedure, Section 245, providing that "the persons whose names are so returned are known as regular jurors and will serve for one year and until other persons are selected and returned," a grand jury organized in December, 1903, from the jury list of that year, and not discharged by the court, may return a valid indictment though the jury list for 1904 may have been made and filed before the date of the indictment.

ORIGINAL application by the state, on the relation of William D. Clark, for a writ of prohibition to the Second Judicial District Court and to the Honorable E. W. Harney, district judge. Dismissed.

*Mr. C. F. Kelley, Mr. E. S. Booth, and Mr. E. M. Lamb, for Relator.*

*Mr. Peter Breen, and Mr. Dan. Yancey, for Respondents.*

MR. JUSTICE HOLLOWAY delivered the opinion of the court.



On January 23, 1903, the jury commissioners of Silver Bow county presented to the clerk of the district court of that county a list of names of persons selected for jury service for the year 1903, containing about 4,500 names, to which list the following sworn statement was attached:

"Butte, Mont., Jan. 22, 1903.

"Mr. Sam Roberts—Dear Sir: We, the undersigned county officials, beg leave to submit report relating to selection of jurors. Sec. 240, 241 and 242 (Penal) Code of Civil Procedure governs the same. This is to certify that Wm. D. Clark, Chairman of County Commissioners, James Maher, Treasurer, and Daniel Brown, Assessor, all officials of Silver Bow county, state of Montana. That the aforesaid Co. officials met in the office of the county clerk on the second Monday in January at 10 A. M. and selected said jury from the regular assessment roll of 1903. And said list of jurors is correct and accurate. Respectfully yours,

"William D. Clark, County Commission.

"James Maher, County Treasurer.

"Daniel Brown, County Assessor.

"Subscribed and sworn to before me this 23d day of January, A. D. 1903.

"Samuel M. Roberts, Clerk.

"[District Court Seal.]"

On December 23, 1903, in Department No. 1 of the district court of Silver Bow county, an order was made directing the impaneling of a grand jury. This order was executed, and such grand jury, having been impaneled and charged, proceeded to the investigation of matters called to its attention, and afterwards returned into court an accusation in writing, charging W. D. Clark with various acts of misfeasance and malfeasance in office; W. D. Clark being a member of the board of county commissioners, chairman of such board, and the same person who, as such chairman, verified the list of persons selected for jury service as above set forth. This grand jury also returned numerous indictments against Clark, who was thereafter ar-

rested and admitted to bail, and, when arraigned, made objection to the accusation and to the several indictments on a number of grounds, particularly specifying, among others, that the list of jurors from which the panel of grand jurors was selected was not drawn in accordance with the provisions of the law, in that (a) the jury commissioners did not meet at the time and place designated by law for drawing such list; (b) that the list of names returned to the district clerk was not drawn from the assessment roll for 1902; (c) that such list was not selected by the jury commissioners, or a majority of such board acting as such, but by one Lottie C. Smith, a nonofficial person, who selected such list from a nonofficial list of persons, and that such list contains names of persons whose names do not appear on such assessment roll.

Upon the trial of this objection or challenge evidence was heard by the court, from which it appeared that on the second Monday of January, 1903, the chairman of the board of county commissioners, the county treasurer and the county assessor met in the county clerk's office; that they employed Lottie C. Smith, a typewriter, to write down the names; that each of the commissioners separately called off some of the names comprised in the list from a book used by the assessor's deputies in making assessments; that a considerable portion of the names were simply copied by Miss Smith without any member of the commission being present; that, after the list had been completed by the stenographer, the affidavit of the commissioners above was attached to such list, and the same then filed in the office of the district clerk.

This objection or challenge was overruled, and exception taken. A challenge to the individual grand jurors was also interposed and overruled.

Thereafter an application was made to this court for a writ of prohibition to prevent the district court from trying the defendant, Clark, upon any of the indictments so found. Upon the return this court dismissed the proceedings so far as they affected the action in the court below with reference to the in-

dictments, and this cause is now submitted on the question whether this court will prevent by prohibition the district court from proceeding to try Clark on the accusation returned against him.

The position assumed by the relator in the court below was this, in effect: I object to being tried on an accusation returned against me by this grand jury, for the reason that I, as a member of the jury commission, either willfully or in absolute disregard of my official duties failed and neglected to perform such duty, and, as the other members of such commission likewise failed in the performance of the duty imposed by law on them as members of such commission, therefore our own nonfeasance has left the county without any jury list from which a lawful grand jury might be selected to accuse, or a petit jury had to try, me for any criminal charge which might be presented against me; and this, too, notwithstanding I verified the list made and filed with the district clerk.

It may be said in passing that in the affidavit above, where the figures "1903" appear, there is clearly a clerical misprision. From the evidence taken on the hearing on the challenge to the grand jury it appears that what was intended in the affidavit was "1902," as the assessment roll for 1903 was not in existence at the time the affidavit was made.

The first question with which we are confronted is this: May a member of the jury commission, who by his own nonfeasance or active misfeasance in office as a member of such commission has rendered the selection of the jury list so irregular that as to others it might be invalid, take advantage of his own wrongdoing when called upon to answer a charge presented by a grand jury selected from such jury list? Or, in other words, will the courts hear a member of such commission, who has solemnly sworn that the jury commissioners did meet at the time and place designated by law, and did select the jury list from the last assessment roll, and that such list is correct and accurate, say now that the matters set forth in such affidavit are untrue, in order that he himself may escape the consequences of a trial

upon an accusation presented by a grand jury selected from such list? The plainest dictates of reason would say at once, "No." Whatever may be the rights of others, not members of such commission, to complain of the irregularities in the selection of such jury list, we hold that this relator's mouth is closed when he assumed to act as such commissioner, and has solemnly declared that the mandates of the law were met and fully complied with, to say that in fact he, as well as the other members of such commission, who also assumed to act as such, had so willfully or negligently disobeyed the law as to render the selection of a jury list wholly nugatory.

To say that the relator's position is tenable would be tantamount to saying that two members of a jury commission may commit any crimes known to the law, and absolutely defy punishment, or even trial, during their terms of office, by designedly vitiating the jury list and taking advantage of their own wrongdoing. It is not possible that any such condition of affairs can exist under, or be countenanced by, the law.

There is no reason apparent why the doctrine of estoppel which pervades the civil department of our law ought not to be applied in the criminal law.

In *State v. Spaulding*, 24 Kan. 1, the defendant was charged with embezzlement. He was city clerk of Leavenworth. Under the law applicants for licenses were required to pay the fee to the city treasurer, and take his receipt therefor, and upon presentation of this receipt to the city clerk the license was issued. However, in many instances applicants for such licenses paid the fee to the clerk, who received the money and issued the license. It was for the misappropriation of such funds that the clerk was charged with embezzling funds belonging to the city. The defendant contended that the funds did not belong to the city, because he had no right to receive them, and because they had not been turned over to the city treasurer; but the supreme court, in disposing of this contention, says: "The state rests upon the broad proposition that when a party assumes to act for another he is concluded by that assumption, no matter who else

is bound; that if A. assumes to act as the agent of B., and receives money belonging to B., he cannot thereafter deny that it is B.'s money, and that notwithstanding B. is not concluded by his acts, and though in fact he was not the agent of B.; that this doctrine, universally recognized in civil, is equally true in criminal, law. A man may not say, 'I have the right to receive money,' and receive it, and then, when challenged for its receipt or embezzlement, avoid liability by saying, 'I had no right to receive it.' He has voluntarily assumed a position the responsibilities of which he may not avoid. The defendant may not say that he holds this money simply for the licensees, because he himself has issued the licenses, which he might rightfully issue only when the city had received the money; that by issuing he conclusively, so far as he was concerned, affirmed that the money he had received and was holding was city money. The law of estoppel binds him whether it binds any one else or not, and is equally potent in a criminal as well as a civil action. \*

\* \* We do not affirm that the city was concluded by the defendant's acts, nor, indeed, that any one is estopped but himself. But we hold that when one assumes to act as agent for another he may not, when challenged for these acts, deny his agency; that he is estopped, not merely as against his assumed principal, but also as against the state; that one who is agent enough to receive money is agent enough to be punished for embezzling it."

In *State v. O'Brien*, 94 Tenn. 79, 28 S. W. 311, 26 L. R. A. 252, the doctrine announced in *State v. Spaulding*, above, is quoted with approval. In this last case the defendant was supreme treasurer of a fraternal society organized under the laws of another state, and when charged with embezzling funds collected for such society in Tennessee he pleaded that the society had not complied with the laws of Tennessee, and therefore had no right to collect the funds in that state; but the supreme court brushed aside this contention, and, in addition to citing the *Spaulding Case* with approval, said: "Conceding that this corporation, organized, as is averred in the indictment, for benevolent purposes, is within the Act of 1891 (and this we do not

now determine), yet, if it should turn out in proof that the defendant, while acting as agent and employe of it, received money paid to him for his principal in the course of his employment, and then feloniously and fraudulently appropriated it to his own use, when indicted for the offense he cannot be permitted to defend himself from the criminal consequence of such wrongdoing upon the ground that his principal was carrying on its business in this state in violation of the terms of that Act. Upon the plainest principles, having assumed to receive this money for his nonresident principal, he is concluded, both civilly and criminally, by this assumption. Whatever others might say about the right of this foreign corporation to come into this state to carry on its business and acquire property interests without having first complied with the requirements of the Act of 1891, at any rate the defendant's mouth is closed when, as agent, he received the money of and for this corporation, and feloniously appropriates it to his own use. The wrongful act of the principal cannot be invoked as a protection against the still more wrongful act of the guilty agent. To him, under such circumstances, the rule of estoppel applies. \* \* \* Without further discussion, we are content to adopt this rule of estoppel, so long recognized in the civil courts, as a proper one for enforcement in the criminal courts of this state, believing, as we do, that it rests on sound reason, and is supported by the weight of authority of eminent respectability."

In 2 Bishop's Criminal Law, 4th Ed., Section 367, the same doctrine is suggested as follows: "But why should not the rule of estoppel, known throughout the entire civil department of our jurisprudence, apply equally to the criminal? If it is applied here, then it settles the question; for by it, when a man has received a thing for another under the claim of agency, he cannot turn around and tell the principal, asking for the thing, 'Sir, I was not your agent in taking it, but a deceiver and a scoundrel.' When, therefore, the principal calls the man under these circumstances to account, the man is estopped to deny the agency he professed,—why, also, if he is then indicted for not

accounting, should he not be equally estopped on his trial upon the indictment?"

By law the selection of a list of persons from which grand or petit juries may be drawn is confided to the chairman of the board of county commissioners, the county treasurer and the county assessor (Section 240, Code of Civil Procedure), and to no others is this authority given; so that, if such officers breach their trust to such an extent as to render the list of no avail for jury purposes, the anomalous situation is presented of a county from which a valid jury may not be drawn until a proper list is selected, and that, too, through no fault of litigants or of the people generally. The seriousness of the situation is manifest. The law contemplates that at all times there shall be in readiness for use a proper list of persons from which juries may be drawn when required. Every litigant, in cases where a jury may be demanded as of right, and every person charged with crime, has a legal right to demand that the jury to try his cause shall be drawn and selected in a lawful manner, and every such person, speaking generally, may with perfect propriety urge any irregularity in the selection of the jury list; but to that rule this exception should be noted, viz., that whereas the people have confided to the jury commissioners the selection of such list to the end that the laws be administered with equal justice to all concerned, and such commissioners have assumed to act, and the public has relied upon such action, as it has a right to do, then, when the public's interests are concerned in the accusation or trial of one of such commissioners, the public will not be misled to its injury by permitting such commissioner to say that he violated his official duty, and now takes refuge behind such violation as a shield to protect himself against the acts of a jury selected from the very list he himself has solemnly declared was duly selected in the manner required by law and a faithful observance of his official duties.

As the corollary to this it follows that this court will not hear relator, Clark, say that by prohibition the lower court ought to

be restrained from proceeding to try him upon the accusation returned against him.

Relator also urges that prior to the time when such accusation was made the term of such grand jury had expired, as a new jury list had been prepared and filed on the second Monday of January, 1904; but this contention is not available.

Section 245 of the Code of Civil Procedure provides: "The persons whose names are so returned are known as regular jurors, and must serve for one year, and until other persons are selected and returned." Standing alone, this section might seem to bear out the relator's contention, but, when read in connection with other sections of that Code, its meaning becomes apparent. When the jury commissioners have made the list of names as directed by Section 240, they must file the same with the district clerk (Section 242), who must write the names on slips or ballots, and deposit them in jury box No. 1 (Section 243). Before depositing such ballots or slips, the clerk must first destroy all slips remaining in such jury box. (Section 244.) When a jury is desired, it is drawn from jury box No. 1. (Section 260.) Assuming, for the purpose of illustration, that there are 1,000 men in a given county qualified and liable for jury service, whose names have been regularly drawn by the jury commissioners, and the slips containing such names have been regularly deposited in jury box No. 1, but during the year only 100 of those names are ever drawn for actual jury service, upon new names being returned the slips containing the 900 other names must be destroyed, and those men would not have performed jury service at all. This illustration, in the light of the sections of the Code above referred to, only serves to emphasize the fact that the term "regular jurors," as used in Section 245, above, is applied to all persons qualified and liable for jury duty whose names were on the last assessment roll, for the presumption is that all such have been selected and returned by the jury commissioners. (Section 241.) But they are not jurors in the sense that they have been summoned to attend court, have been examined under oath touching their qualifica-



tions to act as such, and have been regularly chosen by the court for such service. They are jurors in the sense that they have been set apart as eligibles, liable to be called upon to perform jury duty; liable to be called upon to perform such duty at any time within the year for which they were chosen by the jury commissioners when the list comprising their names was made up, and until other names are selected; and in this sense only do they serve as jurors for such prescribed term. If, then, the district court selected this grand jury from jury box No. 1, and such selection was made during the year 1903, or before the new list for 1904 had been filed, then the law in this regard was complied with, and the jury so selected was regularly constituted (assuming that all preceding steps had been regularly taken, which relator in this instance is not permitted to dispute) and qualified to perform the services for which it was chosen, even though the performance of such service should not be completed before the next jury list was selected and filed. In other words, the term of service mentioned in Section 245 has reference to the term during which a jury may be selected from such names, and not to the term during which such actual jury duties shall be performed. (*State ex rel. Dunn v. Noyes*, 87 Wis. 340, 58 N. W. 386, 27 L. R. A. 776, 41 Am. St. Rep. 45; *In re Gannon*, 69 Cal. 541, 11 Pac. 240, approved in *Kelly v. Wilson*, (Cal.) 11 Pac. 244; *People v. Leonard*, 106 Cal. 302, 39 Pac. 617.)

For the reasons herein given, the alternative writ heretofore issued is quashed, and the proceedings are dismissed.

*Dismissed.*

MR. CHIEF JUSTICE BRANTLY and MR. JUSTICE MILBURN  
concur.

Rehearing denied January 3, 1905.

## IN RE WATSON'S ESTATE.

(No. 1,997.)

(Submitted November 14, 1904. Decided December 10, 1904.)

*Administrators—Persons Entitled to Administer—Public Administrator—Appointee of Decedent's Brothers and Sisters.*

*Held*, that under Section 2430, Code of Civil Procedure, Section 2434 of the same Code as amended (Session Laws 1899, p. 137), and Section 1867 of the Civil Code, the district court properly denied the request of a public administrator for letters of administration, and did not commit error in granting such letters to a resident of the state, whose appointment as administrator had been asked by decedent's non-resident brothers and sisters, the law contemplating that those most interested in the administration of the estate, though non-residents, shall have the right to nominate some person whom they may deem trustworthy, to act in that capacity for them.

*Appeal from District Court, Silver Bow County; John B. McClerman, Judge.*

JUDICIAL proceedings on the estate of John Watson, deceased. From an order refusing to grant letters of administration to John Melville, as public administrator of Silver Bow county, and granting such letters to William Falconer, the public administrator appeals. Affirmed.

*Mr. Charles O'Donnell*, for Appellant.

*Mr. John J. McHatton*, and *Mr. T. J. Walker*, for Respondent.

MR. COMMISSIONER CALLAWAY prepared the following opinion for the court:

On May 30, 1903, John Watson, otherwise known as E. L. Whitmore, died in Silver Bow county, Montana, intestate. Immediately thereupon John Melville, as public administrator of Silver Bow county, filed a petition asking for letters of administration upon his estate. Shortly thereafter one William Fal-

coner filed a like petition, as well as a protest against the issuance of letters to Melville. Supporting the petition of Falconer was a request signed by three brothers and two sisters of the decedent, residents of Scotland. These Scottish heirs requested the appointment of Falconer. Without recounting the different papers filed and steps taken, it is sufficient to say that upon a hearing of the matter the court denied the petition of Melville, and made an order granting letters of administration to Falconer. From the orders refusing to grant letters of administration to Melville and granting such letters to Falconer, Melville has appealed.

The only question presented is whether the public administrator is entitled to letters of administration in preference to the nominee of the nonresident brothers and sisters of the decedent. The question is readily answered by the statutes. Section 2430 of the Code of Civil Procedure provides that: "Administration of estate of all persons dying intestate, must be granted to some one or more of the persons hereinafter mentioned, the relatives of the deceased being entitled to administer only when they are entitled to succeed to his personal estate or some portion thereof, and they are, respectively, entitled therein in the following order: (1) The surviving husband or wife, or some competent person whom he or she may request to have appointed. (2) The children. (3) The father or mother. (4) The brothers. (5) The sisters. (6) The grandchildren. (7) The next of kin entitled to share in the distribution of the estate. (8) The public administrator. (9) A creditor. (10) Any person legally competent. If the decedent was a member of a partnership at the time of his decease, the surviving partner must in no case be appointed administrator of the estate."

Section 2434, Code of Civil Procedure, as amended (Session Laws 1899, p. 137), provides: "No person is competent or entitled to serve as administrator or administratrix who is: (1) Under the age of majority. (2) Not a *bona fide* resident of the state, but if a person otherwise entitled to serve is not a resident of the state, and either the husband, wife or child, or

parent, or brother or sister of the deceased, he may request the court or judge to appoint a resident of the state to serve as administrator, and such person may be appointed, but no other nonresident than a surviving husband, wife or child, or parent or brother or sister shall have such right to request an appointment, and the court or judge must order letters issued to the applicant entitled thereto under the provisions of this article. (3) Convicted of an infamous crime. (4) Adjudged by the court incompetent to execute the duties of the trust by reason of drunkenness, improvidence or want of understanding or integrity."

Section 1867 of the Civil Code provides: "Resident aliens may take in all cases by succession as citizens; and no person capable of succeeding under the provisions of this title is precluded from such succession by reason of the alienage of any relative; but no nonresident foreigner can take by succession, unless he appears and claims such succession within five years after the death of the decedent to whom he claims succession."

The nonresident brothers and sisters are entitled to succession to this estate. If they were residents of the state, they could themselves administer upon it. They are the persons most interested in it, and the law contemplates that therefore they shall have the right to nominate some person in whom they repose trust and confidence to administer it for them. Such person must be one over whom the courts of this state may have jurisdiction and surveillance. (See *In re Craigie's Estate*, 24 Mont. 37, 60 Pac. 495.)

We do not deem the authorities cited by appellant in point. Nor do we see any constitutional objection to the statutes in question. At any rate, the appellant has not pointed out any valid reasons wherein the foregoing statutes are in any wise contrary to or inhibited by the Constitution.

It follows that the orders should be affirmed.

PER CURIAM.—For the reasons given in the foregoing opinion, the orders are affirmed.

Rehearing denied January 10, 1905.

## IN RE DOWNEY.

(No. 2,081.)

31	441
35	324

(Submitted September 26, 1904. Decided December 10, 1904.)

*Supplementary Proceedings—Subjection of Chose in Action—  
Order — Directing Debtor to Make Payment — Validity of  
Order—Habeas Corpus—Office of Remedy—Jurisdiction.*

1. In supplementary proceedings it appeared that defendant was the owner of an order on a certain society, which she had forwarded to it for payment; and it was ordered that, on receipt of the amount of the order, defendant pay to the clerk of the court therefrom a sum sufficient to satisfy the judgment. *Held*, that the order was unauthorized, and the court should have appointed a receiver to collect the order and apply it to the judgment.
2. Where in supplementary proceedings the court erroneously ordered that defendant satisfy plaintiff's judgment out of the proceeds of an order on a certain society payable to defendant, instead of appointing a receiver to collect the order and make the application, and defendant was committed for contempt for failing to comply with the order, the court having had jurisdiction of the supplementary proceedings and of the person of defendant, defendant could not obtain release from custody on *habeas corpus*, irrespective of any question as to the appealability of the order.

*Habeas corpus* proceedings, and *certiorari* in aid thereof, by the state, on relation of Catherine Downey, to secure her release from custody under a commitment by the Second Judicial District Court for a contempt in failing to comply with an order made in supplementary proceedings brought by David Trotter. Complainant remanded.

Mr. C. P. Connolly, for Complainant.

The district court had no authority to make the order which he did committing petitioner to jail for contempt, and such order was null and void, and the writ of *habeas corpus* is properly invoked. (Code of Civil Procedure, Secs. 1263, 1266; *In re Burrows*, 7 Pac. 148; *Winters v. McCarthy*, 2 Abb. (N. C.) 357; *Williams v. Dwinelle*, 51 Cal. 446; *Adams v. Haskell & Woods*, 6 Cal. 317; *Buchanan v. Hunt*, 98 N. Y. 560; *Halhaway v. Brady*, 26 Cal. 589; *Hagerman v. Tong Lee*, 12 Nevada, 335; *Lyons v. Marcher*, 51 Pac. 559; *Gray v. Cook*, 24

How. Pr. 434; *Lorton v. Seaman*, 9 Paige, 609; *McComb v. Wearer*, 11 Hun. 272; *Panton v. Zebley*, 19 How. Pr. 394; *Ex parte Cohen*, 55 Cal. 194; *Ex parte Cottrell*, 59 Cal. 421; 21 Ency. Pl. and Pr. under "Contempt," page 171; *Batcheler v. Moore*, 42 Cal. 415; *McDowell v. Bell*, 86 Cal. 615; *Spaulding v. Ry. & Nav. Co.*, 59 Pac. 426; *Wells v. Torrance*, 51 Pac. 626; *West Side Bank v. Pugsley*, 47 N. Y. 370; *Rodman v. Henry*, 17 N. Y. 484; *Caton v. Southwell*, 13 Barb. 335; *Stale v. Johnson*, 21 Mont. 155; *Brown v. Moore*, 61 Cal. 432; *Bowery Bank v. Widmeyer*, 9 N. Y. Supp. 629; *Sanford v. Mosher*, 13 How. Pr. 137; *Smith v. Weeks*, 60 Wis. 105; *Riddle v. Bulard*, Supplementary Proc. pp. 111-113; *Manken v. Pape*, 65 How. Pr. 453; *Sackett v. Newton*, 10 How. Pr. 561; *Owen v. Dupignace*, 17 How. Pr. 513; *Mosher v. People*, 5 Barb. 575; *Broadhead v. McConnell*, 3 Barb. 188.)

*Mrs. Ella Knowles Haskell*, for Respondent.

MR. CHIEF JUSTICE BRANTLY delivered the opinion of the court.

Original application for a writ of *habeas corpus*, and *certiorari* in aid thereof.

From the returns made to the writs it appears that on April 19, 1904, one David Trotter recovered a judgment in a justice's court in Silver Bow county against the complainant, Catherine Downey, for the sum of \$234.88 and costs; that thereafter on the same day an abstract of the judgment was filed in the office of the clerk of the district court of the county, and the judgment docketed; that an execution was issued by the clerk and placed in the hands of the sheriff for service; that the execution was returned wholly unsatisfied; that immediately thereafter the plaintiff began proceedings supplemental to this execution by filing in the district court his affidavit setting forth that the said Downey, the defendant named in the execution, possessed property which she unjustly refused to apply toward the satisfaction of the judgment, to-wit, "an order for \$2,000, or the

cash already paid thereon, said order being upon J. C. Carroll, supreme treasurer of the C. K. of A., and being drawn by Dr. F. Gauder, supreme president, and Gerald Reiter, supreme secretary"; that the court thereupon issued its order requiring the defendant to appear at 2 o'clock in the afternoon and answer concerning her property; that she did appear and was examined; that from this examination it appeared that the defendant was the owner of an "order" upon the Catholic Knights of America, purporting to be immediately payable in St. Louis, Missouri, which she had then forwarded to the proper officer of the society at St. Louis for payment; and that on April 22d the court entered the following order: "The matter of supplementary proceedings to execution coming on regularly to be heard this 22d day of April, A. D. 1904, and after the hearing of the testimony of the plaintiff and the defendant, the same having been fully considered by the court, and it appearing therefrom that the defendant is about to receive and has received property which she unjustly refuses to apply to the satisfaction of the judgment in the above-entitled action: Now, therefore, it is ordered that upon receipt of \$2,000 to be paid on an order forwarded by the defendant to J. C. Carroll, supreme treasurer of the C. K. of A., she, the defendant, C. Downey, do pay, and she is hereby ordered to pay, into the hands of the clerk of this court, out of said sum, the sum of \$247, to satisfy said judgment in full."

The complainant was present in court when the order was made. It further appears that, this order not having been obeyed, the court, upon application of the said Trotter, and after an examination of the complainant, adjudged her guilty of contempt, and committed her to jail until she should render obedience to the order by making the payment as directed, and that the complainant is detained in custody under a commitment issued in pursuance of this order. These proceedings were thereupon instituted to secure the release of the complainant upon the ground that the order was made without jurisdiction.

The contention is made by the complainant that the order entered on April 22d, requiring her to pay the amount of the

judgment to the clerk out of moneys to be collected upon the order, is void, because in excess of jurisdiction, in this: that the order for \$2,000 was the only asset in her hands or within her control touching which the court could have made any order; that the amount due thereon had not been collected, and was not under her control; and that, as the payer named in the order was not before the court, the only authority the court had in the premises, under the statute, was to direct the complainant to assign her right therein to Trotter to the amount of his judgment, or to appoint a receiver to collect the order and to pay the judgment out of its proceeds.

It is argued by the defendants that this order is appealable, and that, such being the case, any error committed by the court was merely an irregularity or error within jurisdiction, and cannot be reviewed in this proceeding.

That the order directing payment to the clerk out of the moneys to be collected by the complainant was erroneous is apparent when we look to the statute authorizing the proceeding in aid of execution. The proceeding was instituted under Section 1260 of the Code of Civil Procedure. This and the following section specify the circumstances under which the judgment debtor may be required to answer. Under the former this may be done after an execution has been returned unsatisfied. The latter section (1261) is more stringent in its provisions. Under it the examination may be had before the return of the execution, and under some circumstances the debtor may be arrested. Section 1262 permits a person owing the judgment debtor to make payment to the sheriff and receive a discharge from him. Section 1263 provides a procedure to reach property in the hands of third persons, or debts due from them. Section 1264 authorizes the calling of witnesses in order to determine issues of fact arising during any of the proceedings. The order which may be made as to the disposition of property found to belong to the defendant is authorized by Section 1265. The remaining sections of the chapter provide for cases wherein the rights of third parties are put in issue, and for subjecting to the payment



of the judgment, through the agency of a receiver, assets which are not capable of manual delivery, or which may not be subject to sale by the sheriff under the execution. For we apprehend that if the property discovered is not exempt from execution, and of such a nature that it may be sold under the execution, and there are no claims of interest in it by third persons which should be determined by an appropriate action, it should be applied to the satisfaction of the judgment under the execution. The general purpose of the chapter is to provide a substitute for a creditors' bill—a cheaper and easier method of reaching assets of the debtor which cannot be reached by the execution unaided. This is the view expressed by the Supreme Court of California in the early case of *Adams v. Hackett*, 7 Cal. 187; and, where the statute is followed, every species of property which is not exempt from execution may be made available to satisfy the judgment creditor's claim, whether in the form of mere choses in action or property capable of manual delivery. A substantial compliance with the statute is required. It cannot be invoked except for the purpose of enabling the judgment creditor to reach property which cannot be reached by the execution unaided. For if the property sought to be reached is in open view and tangible, the statute does not avail. The court must look to it for authority, and should make no order nor adopt a course of procedure not authorized by it. It may order the delivery to the sheriff of the property found in the hands of the debtor or of a third party where the title is not in issue, or it may authorize suit by the creditor to recover a debt due the defendant, or, in case either of these courses will not be effective, it may appoint a receiver to take charge of the property, and pursue such a course with reference to it that the creditor may receive satisfaction of the claim. There is no authority to require the debtor to collect his choses in action and apply them to the debt. Under the facts of this case, the court should have appointed a receiver to collect the claim of the debtor and apply it, or so much of it as was necessary. The order does not require the complainant to deliver up any property. It merely

requires her to pay the debt upon receipt of the money alleged to be due upon the order.

But though all this be true, is the order therefore void, so as to be open to collateral attack in this proceeding? We think not. No question is made but that the court had jurisdiction of the supplementary proceeding and of the person of the complainant. It had power to decide all questions arising upon the hearing, and also to make afterwards an order determining the rights of the parties.

The correctness of the conclusion reached depended upon a correct construction of the statute. If, in applying to it the rules of construction, and endeavoring to ascertain the proper course to pursue, the court fell in error, this was error only in the exercise of jurisdiction, which may not be reviewed and corrected by *habeas corpus*. It is well settled that this writ may not be used as a writ of error. (*In re Boyle*, 26 Mont. 365, 68 Pac. 409, 471; 15 Am. and Eng. Ency. Law, 172.) Under it the only inquiry permissible is whether the court had jurisdiction of the subject-matter and of the parties, and, though during the course of the particular proceeding even gross errors may have intervened, still these do not render the ultimate determination void; nor is the complainant in this case entitled to have her release on the ground that the court directed the application of the property by a mode which the statute does not expressly authorize. Under a proper construction of the statute, the chose in action could be applied to the satisfaction of the judgment. The court could have appointed a receiver, and directed him to collect and apply the proceeds so far as necessary. Instead of doing this, it practically made the complainant a receiver for that purpose. If she was not content to abide the determination of the proceeding, it was her right to have the error corrected by appeal or suitable method of review, and not to disobey the order. The principle of the case of *State ex rel. Coad v. Judge of Ninth Judicial District Court*, 23 Mont. 171, 57 Pac. 1095, is applicable. In that case the district court had issued a writ of *mandamus* to compel the relator, who was the clerk and re-

order of Broadwater county, to permit one Lambert to have access to the records of the county for the purpose of preparing an index of them under a contract made by him with the board of county commissioners. The board had no authority, under the law applicable, to make the contract in the manner in which it was made. The district court issued the writ, holding that the contract was valid, whereas it was void. The relator was punished for disobeying the writ. Upon *certiorari* this court held that the decision of that court that the contract was valid, though clearly erroneous, was error within jurisdiction, and that it was the relator's duty to obey the writ until it had been set aside on appeal. So, in California, under a statute identical with the one now under consideration, where the district court had directed a debtor to deliver up a paid-up insurance policy which was exempt from execution, to be applied to the satisfaction of the creditor's judgment, the supreme court refused the writ on the ground that the court had the power under the statute to decide the question of exemption, and that, even though its decision was wrong, and the order directed exempt property to be delivered up, the error did not render the order void. (*Ex parte McCullough*, 35 Cal. 97.)

The appealable or nonappealable character of the order is not determinative of the question whether the writ will issue. As we have already said, a solution of this question rests upon an answer to the inquiry whether the order or judgment complained of is void, so as to be open to collateral attack.

The result is that the complainant must be remanded, and it is so ordered.

MR. JUSTICE HOLLOWAY concurs.

MR. JUSTICE MILBURN: I concur in the result, and in the order of this court.

WESTERN LOAN & SAVINGS COMPANY, APPELLANT,  
v. SILVER BOW ABSTRACT COMPANY,  
RESPONDENT.

(No. 1,996.)

(Submitted November 12, 1904. Decided December 16, 1904.)

*Abstracts of Title—Omissions—Liability of Abstracter—Priority of Contract—Foreign Corporations—Licenses—Expiration—Renewal.*

1. Where, though defendant abstract company had arrangements with plaintiff loan association by which abstracts were furnished at the cost of borrowers from the association, to be used by plaintiff, defendant agreed to furnish the abstract in question for plaintiff, and delivered the same knowing that it was made for plaintiff's exclusive benefit and use, and that plaintiff would rely thereon, there was sufficient privity of contract to enable plaintiff to recover damages sustained by reason of a failure of the abstract to disclose an unsatisfied judgment against the land referred to therein.
2. Where plaintiff, a foreign corporation, was licensed to do business in Montana at the time it contracted with defendant abstract company for the preparation of an abstract, and it was not contended that plaintiff had not complied with the law at the time the mortgage taken on the faith of such abstract was foreclosed, and at the time action was brought to recover damages sustained from an omission in such abstract, it was immaterial that a short period existed in the meantime, during which plaintiff's license to do business had expired, and remained unrenewed.

*Appeal from District Court, Silver Bow County; E. W. Harney, Judge.*

ACTION by the Western Loan & Savings Company against the Silver Bow Abstract Company. From a judgment in favor of defendant, plaintiff appeals. Reversed.

*Mr. John A. Shelton*, for Appellant.

*Mr. C. C. Darrow*, and *Mr. W. I. Lippincott*, for Respondent.

MR. COMMISSIONER POORMAN prepared the following opinion for the court:

In this case the district court sustained a motion for nonsuit, and judgment was entered for defendant. The appeal is from this judgment.

1. The action was commenced to recover damages alleged to have been sustained by plaintiff by reason of a defective abstract of title to certain real estate which one George A. McDonald mortgaged to plaintiff to secure a loan, the defect being a failure to note in the abstract an unsatisfied judgment then of record against McDonald.

"On motion for nonsuit, \* \* \* that which the evidence tends to show must be taken as proved." (*Cummings v. Helena & Livingston S. & R. Co.*, 26 Mont. 434, 68 Pac. 852; *McCabe v. Montana Central Ry. Co.*, 30 Mont. 323, 76 Pac. 701, and cases cited.)

In this case the evidence tends directly to show that the plaintiff is a building and loan association incorporated under the laws of Utah, and that McDonald was at the time a stockholder therein, and resided at Butte, Montana; that Paul A. Ozanne was president and general manager of defendant company from 1898 to 1900, and, as such official, signed its annual reports, and that he was also the agent of plaintiff company for the purpose of appraising the value of real estate offered as security for loans; that, under an arrangement previously made between plaintiff and defendant, applicants for loans were required to furnish abstracts prepared by defendant, the applicant paying defendant therefor; these abstracts were to be furnished plaintiff, and not the applicant, and the statements therein were relied upon by plaintiff; that the abstract in question was furnished under this arrangement. On May 10, 1899, the written application of McDonald for a loan, offering certain lands for security, was signed and sworn to before Paul A. Ozanne as a notary public, and on the same day the value of this security was appraised by Ozanne and one other, and on May 20th Ozanne sent the application for a loan, together with the appraisal, to the plaintiff, at Salt Lake, Utah. The abstract was made by defendant, and closed with this statement: "We further certify that there are no unsatisfied judgments, liens, attachments or unpaid taxes appearing of record and affecting the property above described, except such as are noted herein.

Witness our hand and the corporate seal of said company hereto attached this 13th day of May, A. D. 1899, at 2 o'clock p. m. Silver Bow Abstract Co. by Paul A. Ozanne, Manager." This abstract did not contain any reference to a judgment against McDonald. The plaintiff relied exclusively on the abstract being correct, and suffered damage by reason of this omission. The abstract was sent to the plaintiff by Ozanne on May 20th, and the loan was approved May 27th or 28th. The mortgage from McDonald to the plaintiff was acknowledged before Ozanne on June 9th, and about June 13th the check for the loan was sent to Ozanne, and was made payable to McDonald. The plaintiff's license to do business in Montana expired May 31st, and it was not renewed until July 25th, the explanation given being that the state auditor did not furnish the company a form of statement; that, relying upon this being furnished, the company did not make a report until it received this form from the auditor. All the dates herein referred to are in the year 1899.

The motion for nonsuit is based upon two grounds: (1) That there was no privity of contract between plaintiff and defendant; (2) that the plaintiff was not authorized to do business in Montana at the time this mortgage was executed.

The general, perhaps universal, rule of law is that there must be either contract, or privity of contract, to constitute liability on the part of the abstracter. (*Symms v. Cutter*, 9 Kan. App. 210, 59 Pac. 671.) This rule of law is conceded by the appellant. "Privies" are defined as "persons connected together, or having mutual interest in the same action or thing by some relation other than that of actual contract between them." (Black's Law Dictionary, 940.) "A contract made expressly for the benefit of a third person, may be enforced by him at any time before the parties thereto rescind it." (Section 2103, Civil Code; *Burton v. Larkin*, 36 Kan. 246, 13 Pac. 398, 59 Am. Rep. 541; *McLaren v. Hutchinson*, 22 Cal. 187, 83 Am. Dec. 59.)

The evidence in this case, being admitted for the purpose of this motion to be true, tends not only to establish privity of contract, but an actual contract, between the plaintiff and defend-

ant with respect to this abstract. The defendant knew that the abstract was made for the exclusive benefit and use of the plaintiff, and knew that the plaintiff would rely thereon, and the abstract was delivered by the defendant to the plaintiff. Under this state of facts, there can be no doubt as to the liability of the defendant if the action can be maintained. (*Brown v. Sims*, 22 Ind. App. 247, 53 N. E. 779, 72 Am. St. Rep. 308.)

2. It appears from the record that the plaintiff was licensed to do business in the state of Montana to and including the 31st day of May; that this abstract was made on the 13th day of May; that it was sent by the defendant to the plaintiff on the 20th day of May; that the plaintiff acted thereon, and approved the loan not later than the 28th day of May. It appears, therefore, that the contract or privity of contract existing between the plaintiff and the defendant with respect to this abstract was prior to the time when the plaintiff's license expired, and there is no pretense that plaintiff had not complied with the law at the time the mortgage was foreclosed and at the time this action was commenced.

It is unnecessary to consider the proposition as to whether the penalty named in the law (Session Laws 1897, p. 231) is exclusive, or whether the plaintiff can be further punished by having all his contracts declared void or voidable.

We think this judgment should be reversed, and the cause remanded.

PER CURIAM.—For the reasons stated in the foregoing opinion, the judgment is reversed and the cause remanded.

31	452
131	455
31	452
35	431

POLLOCK MINING & MILLING COMPANY, RESPOND-  
ENT, v. DAVENPORT, APPELLANT.

(No. 1,998.)

(Submitted November 14, 1904. Decided December 16, 1904.)

*Quieting Title—Pleading—Allegation of Ownership—Appeal.*

Under Code of Civil Procedure, Section 1310, providing that an action may be brought by any person against another who claims an estate or interest in real property adverse to him, to determine such adverse claim, a complaint averring that plaintiff "claims to be the owner" of the property in question, and "claims title in fee," and that defendant "claims an estate or interest" therein adverse to plaintiff, which claim of defendant is without right, was not objectionable for the first time on appeal, on the ground that it nowhere pleads that plaintiff is the owner of the property, and pleads no better title for plaintiff than that set forth for defendant.

*Appeal from District Court, Silver Bow County; E. W. Harney, Judge.*

ACTION by Pollock Mining & Milling Company, a corporation, against Lee Davenport. From a judgment in favor of plaintiff, defendant appeals. Affirmed.

*Messrs. Kirk & Clinton*, for Appellant.

*Mr. F. W. Bacorn*, for Respondent.

MR. COMMISSIONER CALLAWAY prepared the following opinion for the court:

Action to quiet title. The plaintiff, a corporation, alleged itself to be in the possession of the premises in controversy, and "that the said plaintiff claims to be the owner of, and claims title in fee to, the said premises, and that the said defendant claims an estate or interest therein adverse to the said plaintiff; that the claim of the said defendant is without any right whatever; and that the said defendant has not any estate, right, title or interest whatever in said lands or premises or any part there-



of." To this complaint the defendant answered. A demurrer to the answer was sustained, and upon the defendant's refusal to amend, judgment was entered for the plaintiff, from which judgment the defendant has appealed.

In this court the defendant attacks the sufficiency of the complaint, saying that the plaintiff "nowhere pleads that it is the owner of the property in controversy; it pleads that the plaintiff claims to be the owner and the defendant claims to be the owner," and says that the plaintiff has pleaded no better title for itself than it has for defendant. By the provisions of Section 1310 of the Code of Civil Procedure, "an action may be brought by any person against another who claims an estate or interest in real property adverse to him, for the purpose of determining such adverse claim." The complaint is not a model, it is true, but it is alleged therein that the plaintiff is in possession of the premises; that he claims title in fee to the same; that the defendant claims an estate or interest therein adverse to the plaintiff; and that the claim of the defendant is without any right whatever, etc.

In construing Section 738, Code of Civil Procedure of California, which is identical with our Section 1310, the court said: "The letter of this section would authorize any person to maintain the action whether he himself had any interest in the property or not. We are not, however, inclined to give it this broad construction. But it is clearly not necessary that he have title to the property. If he has the right to possession, and another is claiming an estate or interest adverse to such right, he may maintain the action. The language of the Code is broad enough to cover every interest or estate in lands of which the law takes cognizance. *Pierce v. Felter*, 53 Cal. 18; *Stoddart v. Burge*, 53 Cal. 398; *Smith v. Brannan*, 13 Cal. 107; *Liebrand v. Otto*, 56 Cal. 247." (*Pennie v. Hildreth*, 81 Cal. 127, 22 Pac. 398.)

And in *McKinnie v. Shaffer*, 74 Cal. 614, 16 Pac. 509, the court said: "Whatever interest the plaintiff has may be quieted. If a title in fee, such interest may be quieted; if a less interest,

the less interest may likewise be quieted." (See *Merk v. Bowery Mining Co.*, 31 Mont. 298, 78 Pac. 519, and cases cited.)

So far as the record discloses, no criticism was made upon the complaint in the court below, and the averments, "claims to be the owner of," and "claims title in fee," must be held sufficient in the absence of such a seasonable attack. (*Hefferlin v. Karlman*, 29 Mont. 139, 74 Pac. 201.) The pleader evidently meant to employ the word "claims" in the sense of "avers" or "alleges." Among other definitions of the word "claim," the Standard Dictionary gives the following: "To hold to be true against implied denial or doubt; affirm; assert." Although this is a loose use of the term, its meaning is plain, and will be held sufficient under circumstances like the foregoing.

This disposes of the only question argued by defendant. It follows that the judgment should be affirmed.

PER CURIAM.—For the reasons stated in the foregoing opinion, the judgment is affirmed.

*Affirmed.*

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GLENGARRY MINING & MILLING COMPANY, RE-  
SPONDENT, v. DAVENPORT, APPELLANT.

(No. 1,999.)

(Submitted November 15, 1904. Decided December 16, 1904.)

*Action to Quiet Title—Pleading.*

For Syllabus, see *Pollock Mining & Milling Co. v. Davenport*, ante, page 452.

*Appeal from District Court, Silver Bow County; E. W. Harney, Judge.*

ACTION by Glengarry Mining & Milling Company, a corporation, against Lee Davenport. From a judgment in favor of plaintiff, defendant appeals. Affirmed.

*Messrs. Kirk & Clinton*, for Appellant.

*Mr. F. W. Bacorn*, for Respondent.

PER CURIAM.—This case presents the same question involved in that of *Pollock Mining & Milling Company v. Davenport*, decided this day, *ante*, page 452. Therefore, on the authority of the last mentioned case the judgment is affirmed.

*Affirmed.*

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STATE, RESPONDENT, v. HLIBOKA, APPELLANT.

31	455
38	454

(No. 2,073.)

(Submitted November 10, 1904. Decided December 24, 1904.)

*Murder—Information—Sufficiency.*

Under the Penal Code of Montana, an information charging that accused committed a murder willfully, unlawfully, feloniously and premeditatedly, and of his malice aforethought, charges murder in the first degree, though it fails to use the word "deliberately."

*Appeal from District Court, Cascade County; J. B. Leslie, Judge.*

GEORGE HLIBOKA was convicted of murder in the first degree, and was sentenced to be hanged. From the judgment, and from an order denying his motion for a new trial, he appeals. Affirmed.

*Mr. A. P. McAnelly, Messrs. Greene & Cockrill*, and *Mr. P. H. Leslie*, for Appellant.

The information is insufficient to sustain a verdict or judgment of murder in the first degree. (Constitution of Montana, Art. III, Sec. 16; *Cannon v. State*, (Ark.) 31 S. W. 150; *State v. Brown*, 21 Kan. 43; *State v. Boyle*, 28 Iowa, 522; *State v.*

*Knouse*, 29 Iowa, 118; *State v. McCormick*, 27 Iowa, 402; *Fouts v. State*, 4 Greene, (Iowa) 500; *People v. Valencia*, 43 Cal. 552; *People v. Long*, 39 Cal. 696; *People v. Knapp*, 71 Cal. 1; *State v. Wong Fun*, 40 Pac. 95; *Territory v. Layne*, 7 Mont. 228; *State v. Myers*, 99 Mo. 107, 12 S. W. 516; *Leonard v. Territory*, 7 Pac. 872; *Territory v. Manton*, 7 Mont. 169; 10 Ency. Pl. and Pr. 122; 2 Bish. Crim. Proc., Sec. 569 *et seq.*; *State v. Metcalf*, 17 Mont. 417; *Finn v. State*, 5 Ind. 400; *State v. Baker*, 13 Mont. 160; *State v. Meyer*, 58 Vt. 457, and cited in 3 Atl. p. 195; Whorton, Criminal Pl. and Pr. p. 709 *et seq.*; *State v. Brainerd*, 25 Iowa, 572; 1 Bishop's Criminal Proc. p. 980; *State v. Curtis*, 70 Mo. 599; *State v. Werner*, 66 Mo. 13; *State v. Mills*, 74 Mo. 220; *Nye v. People*, 35 Mich. 16; *State v. O'Hara*, 92 Mo. 59; *Atkinson v. State*, 20 Tex. 522; *State v. Kane*, 8 Ohio St. 307; *Fouts v. State*, 8 Ohio St. 98; *Leonard v. Territory*, 2 Wash. 381; *Shaffer v. State*, 22 Neb. 557; *State v. Brasen*, 21 Kan. 38; *Holt v. Territory*, 43 Pac. 1083; *State v. Shafer*, 26 Mont. 11.)

*Mr. James Donovan, Attorney General, for the State.*

MR. COMMISSIONER CALLAWAY prepared the following opinion for the court:

George Hliboka, having been found guilty of the crime of murder in the first degree, was sentenced to be hanged. From this judgment, and from an order denying his motion for a new trial, he has appealed to this court.

The only error which has been argued by his counsel in their brief is that the information under which he was convicted does not charge any greater crime than that of murder in the second degree. The information charges that the defendant did the murder willfully, unlawfully, feloniously, premeditatedly and of his malice aforethought. It is argued that the information does not charge murder in the first degree, for the reason that the word "deliberately" is not included among the charging words.

There is a wide divergence of opinion between the adjudicated cases and text-writers upon the question which this contention presents. It can hardly be considered an open one in this jurisdiction, since the very able and exhaustive opinion rendered by the supreme court of the territory in *Territory v. Stears*, 2 Mont. 324, which has been followed or cited with approval in *Territory v. McAndrews*, 3 Mont. 158; *Territory v. Godas*, 8 Mont. 347, 21 Pac. 26; *Territory v. Johnson*, 9 Mont. 21, 22 Pac. 346; *State v. Northrup*, 13 Mont. 522, 35 Pac. 228, and *State v. Metcalf*, 17 Mont. 417, 43 Pac. 182. The Stears decision is in consonance with the great weight of authority in this country, and, we think, with sound reason. The basic principle underlying the doctrine announced in that case is that the legislature has the right to define the crime of murder, to divide it into degrees, and to prescribe the method of determining the degree in a particular case. That it has such power is undisputed by any one, and that it has exercised it is readily seen by an inspection of the following sections of the Penal Code, viz.:

"Sec. 350. Murder is the unlawful killing of a human being, with malice aforethought.

"Sec. 351. Such malice may be express or implied. It is express when there is manifested a deliberate intention unlawfully to take away the life of a fellow creature. It is implied, when no considerable provocation appears, or when the circumstances attending the killing show an abandoned and malignant heart.

"Sec. 352. All murder which is perpetrated by means of poison, or lying in wait, torture, or by any other kind of willful, deliberate and premeditated killing, or which is committed in the perpetration or attempt to perpetrate arson, rape, robbery, burglary, or mayhem, is murder of the first degree; and all other kinds of murder are of the second degree.

"Sec. 353. Every person guilty of murder in the first degree shall suffer death; and every person guilty of murder in the second degree, is punishable by imprisonment in the state prison not less than ten years."

"Sec. 2145. Whenever a crime is distinguished into degrees, the jury, if they convict the defendant, must find the degree of the crime of which he is guilty."

There is but one crime of murder, and its division into degrees is simply for the purpose of adjusting the punishment "with reference to the presence or absence of circumstances of aggravation." (*Davis v. Utah*, 151 U. S. 262, 14 Sup. Ct. 328, 38 L. Ed. 153.) The custom of punishing murderers in different modes, commensurate with the aggravation of their crimes, is not a new or even a modern one. It has obtained from the earliest times. Numerous examples are given by Blackstone (Book 4, c. 14). If murder in the first degree and murder in the second degree were two different crimes, then they should be so charged, and there would be no necessity for the jury to find the degree of the crime at all. It would only be necessary for the jury to find that the defendant was guilty in manner and form as charged in the information.

In *Territory v. Stears*, *supra*, the court comments upon the fact that an indictment for murder at common law charged that the defendant "feloniously, willfully and of his malice aforethought" did the act that caused the killing. Under such an indictment the defendant could be convicted of murder in the first degree, and, before a conviction of murder in the first degree could be had at common law, it was necessary, precisely as it is under our statute, that the element of settled deliberation, premeditation, purpose and design enter into the crime. The court says that inasmuch as our statutory definition of murder is, in legal effect, the same as the common-law definition, and we have adopted the common-law description of the crime, an indictment for murder, good at common law, is good under our statute.

A majority of the courts of last resort in the United States hold that the words "deliberately" and "premeditatedly" are not essential to make a good indictment or information for murder in the first degree. Such is the rule in Alabama, California, Colorado, Connecticut, Dakota, Idaho, Louisiana, Maine, Mary-

land, Massachusetts, Michigan, Minnesota, Montana, Nevada, New Hampshire, New Mexico, North Carolina, Oklahoma, Pennsylvania, Tennessee, Texas, Utah, Virginia, Washington and Wisconsin.

Some comparatively recent cases are *State v. Cole*, 132 N. C. 1069, 44 S. E. 391; *State v. Johnson*, 104 La. 417, 29 South. 24; *Ruiz v. Territory*, 10 N. Mex. 120, 61 Pac. 126; *Perkins v. Territory*, 10 Okl. 506, 63 Pac. 860. But if any additional authority is needed to sustain this proposition it will be found in the case of *Davis v. Utah Territory*, 151 U. S. 262, 14 Sup. Ct. 328, 38 L. Ed. 153, in which Mr. Justice Harlan, speaking for the court, goes over the subject thoroughly. The statutes construed are practically the same as our own upon this subject. In that opinion we find the following: "Other assignments of error present the objection that the indictment is so framed that it will not support a verdict of guilty of murder in the first degree. This objection is based in part upon the theory that murder in the first degree and murder in the second degree are made distinct, separate offenses. But this is an erroneous interpretation of the statute. The crime defined is that of murder. The statute divides that crime into two classes in order that the punishment may be adjusted with reference to the presence or absence of circumstances of aggravation. And therefore, 'when-ever a crime is distinguished into degrees,' it is left to the jury, if they convict the defendant, 'to find the degree of the crime of which he is guilty.' 2 Comp. Laws Utah, 1888, p. 715, Sec. 5076. If the defendant pleads guilty 'of a crime distinguished or divided into degrees, the court must, before passing sentence, determine the degree.' *Id.* p. 721, Sec. 5101. An indictment which clearly and distinctly alleges facts showing a murder by the unlawful killing of a human being with malice aforethought is good as an indictment for murder under the Utah statutes, although it may not indicate upon its face, in terms, the degree of that crime, and thereby the nature of the punishment that may be inflicted. Of course, if an indictment is so framed as to clearly show that the crime charged is not of the class desig-

nated as murder in the first degree, the jury could not find a verdict of guilty of murder in that degree. But, as already suggested, the pleader need not indicate the degree, but may restrict the averments to such facts as, in law, show a murder—that is to say, an unlawful killing, with malice aforethought—leaving the ascertainment of the degree to the jury, or, in case of confession, to the court. As the acts which, under the Utah statute, constitute murder, whether of the highest or lowest degree, constituted murder at common law, it is clear that an indictment good at common law as an indictment for murder, in whatever mode or under whatever circumstances of atrocity the crime may have been committed, is sufficient for any degree of the crime of murder under a statute relating to murder as defined at common law, and establishing degrees of that crime in order that the punishment may be adapted to the special circumstances of each case. These views are abundantly sustained by authority.”

There is no merit in appellant's contention. To hold otherwise would be to hold that under our statute, framed as it is to simplify the forms of pleading, and to regard the substance rather than the shadow, the pleader must inform against one accused of murder with more particularity than was required at common law. As said in *People v. King*, 27 Cal. 507, 87 Am. Dec. 95: “Our Criminal Code was designed to work the same change in pleading and practice in criminal actions which is wrought by the Civil Code in civil actions. Both are fruits of the same progressive spirit, which in modern times has endeavored at least to do away with the mere forms and technicalities of the common law, which were productive of no good, and frequently brought the administration of justice into contempt by defeating its ends.”

The only complaint appellant makes against the information is that the word “deliberately” was omitted therefrom. Otherwise he concedes that it contains a statement of the facts constituting the offense, in ordinary and concise language, and in such a manner as to enable a person of common understanding to



know what is intended; that it is certain as to the party charged, the offense charged, and the particular circumstances of the offense charged. (Penal Code, Secs. 1832, 1834.)

It follows that the judgment should be affirmed.

PER CURIAM.—For the reasons given in the foregoing opinion, the judgment is affirmed.

*Affirmed.*

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IN RE COLBERT'S ESTATE.

SCHEUER, APPELLANT, v. STATE ET AL., RESPONDENTS.

31	461
32	455
31	461
34	147
34	325

(No. 2,000.)

(Submitted November 15, 1904. Decided December 24, 1904.)

*Will Contest—Procedure—Presumption of Revocation — Evidence of Lost Will—New Trial—Appeal.*

**Appeal—Bill of Exceptions.**

1. A bill of exceptions not made a part of the statement on motion for a new trial cannot be considered on appeal from the order denying it.

**Probate of wills—Contests—Practice.**

2. Under Code of Civil Procedure, Sections 2340-2346, the proponent of a will must first make out a *prima facie* case; that is, make such proof as would entitle the will to probate in the absence of a contest. The contestant then attacks its validity, the proponent defends the same, and the contestant rebuts the testimony of the proponent, who may sur-rebut any new testimony; but the contestant has the right to open and close.

**Lost Wills—Presumption—Burden of Proof.**

3. It being proved that a lost will was last seen in the possession of the testator, who was in the exercise of his mental faculties, the presumption is that he himself destroyed it *animo revocandi*, and the burden of proof is then on the proponent to overcome such presumption.

**Lost Wills—Destruction—Presumption—Proof.**

4. To overcome the presumption that the testator destroyed a lost will, the proof must be clear, satisfactory and convincing.

**Lost Wills—Witness—Possession—Evidence.**

5. Evidence that one who was alleged to be a witness to a lost will, but who denied the same, stated at the funeral of testator that he had the will in his pocket, did not tend to prove even remotely that the witness had it in his possession, no one ever having seen it in his possession so far as the testimony disclosed.

**Lost Wills—Declarations of Testator—Presumption of Revocation.**

6. Declarations of the testator, when not a part of the *res gestae*, are inadmissible, in conjunction with testimony of witnesses who had seen a lost will, to overcome the presumption of revocation from the fact that the will was last seen in his possession when he was in the exercise of his mental faculties.

**New Trial—Newly Discovered Evidence—Affidavit—Sufficiency.**

7. The uncontradicted affidavits for a new trial on the ground of newly discovered evidence in proceedings to establish a lost will showed diligence on the part of proponent, and that a newly discovered witness would testify that he was shown the will by the testator, and was familiar with its contents, and that after his death he was shown the will by, and recognized it in the hands of, a subscribing witness to the will, such evidence of its existence being the essential evidence which proponent lacked on the trial. *Held*, that the court abused its discretion in not granting a new trial.

*Appeal from District Court, Silver Bow County; William Clancy, Judge.*

PETITION by Frederick Scheuer to probate an alleged lost will of Charles Colbert, deceased. Objections were filed thereto by the state and others, and from a judgment denying the probate thereof and from an order denying a new trial, the petitioner appeals. Reversed.

*Mr. James Donovan, and Mr. C. F. Kelley, for Respondent.*

The contestant is not called upon to submit any evidence in support of his contest or protest until after a case has been made by the proponents of the will. (*Collyer v. Collyer*, 110 N. Y. 481; *Idley v. Bowen*, 11 Wend. 227; *Holland v. Ferris*, 2 Bradf. 333; *Newell v. Homer*, 120 Mass. 277; *Harris v. Harris*, 10 Wash. 555; *Perry v. Perry*, 49 N. Y. S. R. 291; *Hatch v. Sigman*, 1 Dem. 519; *Behrens v. Behrens*, 47 Ohio St. 323; *Miner v. Guthrie*, (Ky.) 4 S. W. 179; *Jaques v. Horton*, 76 Ala. 238.) The burden of proof is on the propounders of a lost or destroyed will to show that it was in existence at the death of the alleged testator, or was destroyed in his lifetime without his consent or knowledge, in order to overcome the presumption of revocation. (*Clark v. Turner*, 38 L. R. A. 434, note B, and cases cited; *In re Marsh*, 45 Hun. 107; *Betts v. Jackson*, Brown, 6 Wend. 173; *Idley v. Bowen*, 11 Wend. 236; *Knapp v. Knapp*, 10 N. Y. 276; *In re Nichols*, 40 Hun. 387;

*Buchle's Estate*, 3 Pa. Dist. R. 16; *Mercer v. Mercer*, 87 Ky. 21.) The testimony of each and all of the witnesses for the proponents of the alleged lost will was to the effect that the alleged lost will was always in the possession of the testator, Charles Colbert, and the last seen of it was in his possession. The presumption is therefore conclusive that he destroyed and revoked the same prior to his death. This is so universally held that it would hardly be necessary to cite authorities in addition to what have already been given. (*In re Kennedy's Will*, 62 N. Y. Supp. 1011; *Knapp v. Knapp*, 10 N. Y. 276; *Schultz v. Schultz*, 35 N. Y. 653; *Hard v. Ashley*, 88 Hun. 103, 34 N. Y. Supp. 583; *In re Nichols*, 40 Hun. 387; *Betts v. Jackson*, 6 Wend. 173; *Colvin v. Fraser*, 2 Hagg. Ecc. 266; 3 Phillim. Ecc. 126, 462, 552; 1 Swab. & Tr. 32; 32 Law J. Prob. 202; 36 Law J. Prob. 7; 7 El. & Bl. 886.)

*Mr. John J. McHatton, Mr. George F. Shellon, and Mr. O. J. Saville, for Appellant.*

On the trial, the contestant was plaintiff and had the affirmative of all issues raised by the contest. (Code of Civil Proc. Sec. 2340; *Barney v. Hayes*, 11 Mont. 99; *Estate of Dalrymple*, 67 Cal. 444; *In re Burrell*, 77 Cal. 479, 481; *Estate of Wooten*, 56 Cal. 322, 325; *Estate of Collins*, (Cal.) Myrick's Rep. 73.) The burden of proof was on the contestant. (Code of Civil Procedure, Sec. 3290; *Scott's Estate*, 128 Cal. 57, 60 Pac. 527; *In re Latour's Estate*, (Cal.) 73 Pac. 1070.) Where a will legally executed has been offered for probate, the *onus* is upon the contestant to prove its revocation. The presumption of law is that this will continued in existence and unrevoked by the testator at the time of his death. (*Sugden v. Lord St. Leonards*, 1 Probate Div. 154, reported in Moak's English Reports, Vol. 17, p. 453; *Page v. Maxwell*, 118 Ill. p. 576, is a strong case to the same effect; *Harris v. Knight*, 15 Pro. Div. 170, reported in Abbott's Cases on Descent, Wills and Administration, page 479; *Tynan v. Paschal*, 27 Tex. 386; *Davis v. Sigour-*

ney, 8 Metc. (Mass.) 487; *Minkler v. Minkler*, 14 Vt. 125; *Elizabeth Smith's Will*, 3 Houst. (Del.) 335.) Declarations of the testator are admissible to show that he believed his will to be in existence at the time of his death. (*Behrens v. Behrens*, 47 Ohio St. 323; *Sugden v. Lord St. Leonards*, *supra*; *Whitely v. King*, 17 C. B. (N. S.) 756; *Keen v. Keen*, L. R. 3 P. & D. 105; *Collagan v. Burns*, 57 Me. 465; *Lawyer v. Smith*, 8 Mich. 412; *Smock v. Smock*, 11 N. J. Eq. 157; *Smiley v. Gambill*, 2 Head. (Tenn.) 164; Redfield on Wills, Secs. 322, 323; *In re Groot's Will*, 9 N. Y. Supp. 471.)

It is proper to prove the contents of a will by witnesses who had seen and read the will and were acquainted with its contents. (Code of Civil Procedure, Sec. 2371; *Sugden v. Lord St. Leonards*, *supra*; *Johnson's Will*, 40 Conn. 588; *Southworth v. Adams*, 11 Biss. 256; *Page v. Maxwell*, 118 Ill. 576; *Harris v. Knight*, 15 Pro. Div. 170; *Tynan v. Paschal*, 27 Tex. 386; *Davis v. Sigourney*, 8 Metc. (Mass.) 487; *Minkler v. Minkler*, 14 Vt. 125; *Elizabeth Smith's Will*, 3 Houst. (Del.) 335; *Foster's Appeal*, 87 Pa. St. 67; *In re Soule's Will*, 15 N. Y. Supp. 934; *Dan v. Brown*, 4 Cowen, (N. Y.) 483; *Fetherly v. Waggoner*, 11 Wend. (N. Y.) 602; *Rankin v. Crow*, 19 Ill. 624; *Cook v. Hunt*, 24 Ill. 535; *In re Camp's Estate*, (Cal.) 66 Pac. 227, 228; I Underhill on Wills, Sec. 274, p. 374; *Morris v. Swaney*, 7 Heisk. (Tenn.) 591; *Everitt v. Everitt*, 41 Barb. (N. Y.) 385; *Codington v. Janner*, 57 N. J. Eq. 528, 41 Atl. 874.) The acts and declarations of the testator may be proved by witnesses, to show that the will had not been revoked and the contents thereof. (*Reeves v. Booth*, 2 Mill. (S. C.) 334, 12 Am. Dec. 679; *Chisholm v. Ben*, 7 B. Mon. (Ky.) 408; *Durant v. Ashmore*, 2 Rich. (S. C.) 184; *Johnson's Will*, *supra*; *Sugden v. Lord St. Leonards*, *supra*; *Hatch v. Sigman*, 1 Dem. (N. Y.) 519; *Schnee v. Schnee*, 61 Kan. 643, 60 Pac. 738; *In re Camp's Estate*, *supra*; *Page v. Maxwell*, *supra*; *Foster's Appeal*, *supra*; *Behrens v. Behrens*, 47 Ohio St. 323; *Whitely v. King*, 17 C. B. (N. S.) 756; *Collagan v. Burns*, 57 Me. 449; *Lawyer v. Smith*, 8 Mich. 412; *Smock v. Smock*, 11 N. J. Eq. 157;

Redfield on Wills, Secs. 322, 323; 1 Underhill on Wills, Sec. 277; *In re Valentine's Will*, (Wis.) 67 N. W. 12; *In re Steinke's Will*, (Wis.) 40 N. W. 61, 62; *McDonald v. McDonald*, (Ind.) 41 N. E. 337, 344; *Pickens v. Davis*, 134 Mass. 252; *Betts v. Jackson*, 6 Wend. (N. Y.) 173, 188; *Beadles v. Alexander*, 9 J. Baxter, 604, 2 Am. Prob. Rep. 173.) When a subscribing witness forgets or is hostile, the fact may be proven by other witnesses. (1 Underhill on Wills, Secs. 210-213; *Gillis v. Gillis*, 96 Ga. 1, 15, 23 S. W. 107; *Mays v. Mays*, (Mo.) 21 S. W. 921, 922; *Harp v. Parr*, (Ill.) 48 N. E. 113, 115; *Beadles v. Alexander*, *supra*; *Garrison v. Garrison*, 15 N. J. Eq. 266, 268, 270; *Jauncey v. Thorne*, 2 Barb. Ch. (N. Y.) 40.)

MR. COMMISSIONER CALLAWAY prepared the opinion for the court.

Appeal by one Frederick W. Scheuer from a judgment denying the probate of an alleged lost will, and from an order overruling his motion for a new trial.

In the beginning we are met with the objection on the part of respondents that there is no record before this court upon which it may determine the matters presented by this appeal. This objection is based upon certain alleged fatal irregularities occurring in the preparation and settlement of the statement on motion for a new trial, which are made to appear by a bill of exceptions. This bill of exceptions is not made a part of the statement on motion for a new trial, and under the rule laid down in *Beach v. Spokane Ranch & Water Co.*, 25 Mont. 367, 65 Pac. 106, we cannot consider it. (And see *State ex rel. Beach v. District Court*, 29 Mont. 265, 74 Pac. 498; *Sweeney v. Great Falls & Canada Ry. Co.*, 11 Mont. 34, 27 Pac. 347; *Arnold v. Sinclair*, 12 Mont. 248, 29 Pac. 1124.) We shall therefore pass on to the merits of the controversy.

Charles Colbert died on February 14, 1901, in a cabin in Butte. Among his neighbors he was known as a wealthy, but miserly, old bachelor, and it may be said incidentally that sev-

eral of these expected at his death to find themselves his beneficiaries. Shortly after his demise the clerk of the court received through the mails, or from an unknown source, an instrument purporting to be the last will and testament of Charles Colbert. The beneficiaries therein named were William I. Lippincott and John Woolbeater. In due time thereafter Woolbeater filed his petition asking that the will be admitted to probate. Thereupon the state of Montana, through the attorney general, filed a protest against the probate of this alleged will, on the ground that it was a forgery. The state alleged that Colbert died intestate, leaving no relatives, and that his estate should, under the law, escheat to it. Shortly after this a petition was filed by appellant, Frederick Scheuer, alleging that Colbert made a will in 1896, in which he had named Scheuer and one Lillian E. Burton, now Lillian E. Fluke, his beneficiaries. It was further alleged that this will was in existence at the time of Colbert's death, but had been destroyed or lost, and therefore could not be produced; that it was witnessed by two persons—John Woolbeater and one John Doe, whose true name and residence were unknown. Thereafter appellant filed an amended petition, asking that the lost will be admitted to probate, and in this petition stated that the subscribing witnesses to the will were John Woolbeater and one John Ackerman, both residents of Butte. Appellant and Lillian E. Fluke also filed objections to the will proposed by Woolbeater. The state of Montana likewise filed its objections against the so-called Scheuer or lost will, alleging that no such will had ever been made by decedent. Woolbeater did not file any objections to the so-called Scheuer will. Many pleadings were interposed by the contending parties, but the foregoing seems to be sufficient to illustrate their contentions.

In order to simplify the discussion, it will be well to ascertain first what are the essentials in proving a lost will. In every will case under our statute the rule of procedure is that the proponent of the will must first make out a *prima facie* case; that is to say, must make such proof as would entitle the will to

probate in the absence of a contest. Then the contestant attacks the validity of the will, the proponent defends the same, and the contestant rebuts the testimony of the proponent. Doubtless the proponent may sur-rebut any new testimony adduced for the first time in rebuttal (*Maloney v. King*, 30 Mont. 158, 76 Pac. 4), but the contestant has the right to open and close the case (Sections 2340-2346, Code of Civil Procedure; *Farleigh v. Kelley*, 28 Mont. 421, 72 Pac. 756, 63 L. R. A. 319). This disposes of one of appellant's principal assignments of error.

The following sections of the Code of Civil Procedure are directly pertinent:

"Sec. 2370. Whenever any will is lost or destroyed the district court must take proof of the execution and validity thereof, and establish the same; notice to all persons interested being first given, as prescribed in regard to proofs of wills as in other cases. All the testimony given must be reduced to writing and signed by the witnesses.

"Sec. 2371. No will shall be proved as a lost or destroyed will, unless the same is proved to have been in existence at the time of the death of the testator, or is shown to have been fraudulently destroyed in the lifetime of the testator, nor unless its provisions are clearly and distinctly proved by at least two credible witnesses.

"Sec. 2372. When a lost will is established, the provisions thereof must be distinctly stated and certified by the judge, under his hand and the seal of the court, and the certificate must be filed and recorded as other wills are filed and recorded, and letters testamentary or of administration, with the will annexed, must be issued thereon in the same manner as upon wills produced and duly proved. The testimony must be reduced to writing, signed, certified and filed as in other cases, and shall have the same effect as evidence as provided in Section 2344."

At the trial the state and appellant jointly fought the Woolbeater will, and in turn the state and Woolbeater fought the Scheuer will. After the evidence had been closed as to the

Woolbeater will, the appellant undertook to make out a *prima facie* case. It was incumbent upon him first to show affirmatively either that the will he proposed was in existence at the time of the death of Colbert, or that it was fraudulently destroyed during Colbert's lifetime. This he failed to do. He did prove *prima facie* some pertinent facts; for instance, he adduced evidence tending to prove that Colbert executed a will in the spring of 1896, wherein he and Lillian E. Burton were named as beneficiaries; that its contents were made known to at least three persons; that the will was seen about Christmas time in 1896, in August, 1899, about three weeks before Colbert's death, and on the day before his death. The witness who said he saw the will the day before Colbert died testified that he went to see Colbert upon important business, and conversed with him about it. Without proceeding further in detail, it is sufficient to say that the testimony of this witness, if true, shows beyond any question that at the time when the will was last seen it was in Colbert's possession, and Colbert was then in the exercise of his mental faculties. So far as the record discloses, it was never seen again. The better opinion is that under circumstances like the foregoing the presumption is that the testator, having possession of the will, and being mentally competent, himself destroyed the will *animo revocandi*. This being the case, the burden of proof was on the proponent appellant to overcome this presumption. (See note to *Clark v. Turner*, 38 L. R. A. 434, and cases cited.) And the proof required to overcome it must be clear, satisfactory and convincing.

An instructive case upon this subject is that of *In re Kennedy's Will*, 30 Misc. Rep. 1, 62 N. Y. Supp. 1011, in which the court said: "The law of this state is well settled that, where no testamentary papers have been found after a careful and exhaustive search, the presumption is that the decedent herself destroyed the will with the intention of revoking it. (*Collyer v. Collyer*, 110 N. Y. 481, 18 N. E. 110, 6 Am. St. Rep. 405; *Knapp v. Knapp*, 10 N. Y. 276; *Schultz v. Schultz*, 35 N. Y. 653, 91 Am. Dec. 88; *Hard v. Ashley*, 88 Hun. 103,



34 N. Y. Supp. 583; *In re Nichols*, 40 Hun. 387; *Betts v. Jackson*, 6 Wend. 173.) And even in England, where the courts are not controlled, as here, by any positive statutory provisions, the presumption is the same, as shown by the following cases: *Colvin v. Fraser*, 2 Hagg. Ecc. 266; 3 Phillim. Ecc. 126, 462, 552; 1 Swab. & Tr. 32; 32 Law J. Prob. 202; 36 Law J. Prob. 7; 7 El. & Bl. 886. The only cases where this presumption does not exist will be found to be where the will is clearly shown not to have been in the possession of the testator at the time of his death. (*In re Brechtee's Estate*, N. Y. Surr. Dec. 1893, p. 709; *Hammersley v. Lockman*, 2 Dem. Sur. 524; *Schultz v. Schultz*, 35 N. Y. 653, 91 Am. Dec. 88; *In re Marsh*, 45 Hun. 107.) 'Legal presumptions are founded upon the experience and observation of distinguished jurists as to what is usually found to be the fact resulting from any given circumstances; and, the result being thus ascertained, whenever such circumstances occur, they are *prima facie* evidence of the fact presumed.' (*Betts v. Jackson*, 6 Wend. 173.) In the last-named case the court says that it is a fact that for every will that is publicly destroyed five wills are secretly destroyed by the testator. The law will not speculate as to the motives which may have operated upon the testator's mind, either in the direction of intestacy or otherwise. The presumption that the decedent destroyed the will *animo revocandi* is so strong as to stand in the place of positive proof. The principle that a state of things once shown to exist will be presumed to continue, and that, therefore, the court should presume that, as in the case of a lost deed, the will remained in existence down to the death of the testator, does not apply to the case of a will. *Betts v. Jackson*, *supra*. Bearing in mind, then, this presumption of law, the will must be absolutely held by me to have been destroyed by the testatrix during her lifetime, unless positive and satisfactory proof to the contrary can be produced, sufficient to rebut and overcome that presumption."

This case was affirmed by the Supreme Court of New York by a decision which is found in 53 App. Div. 105, 65 N. Y.

Supp. 879, and was again affirmed by the Court of Appeals in a decision found in 167 N. Y. 163, 60 N. E. 443, in which the court says: "The burden of proof was upon the proponents, and, the execution of the instruments having been shown, it was claimed that the court should presume that they were in existence at the time of the death of the testatrix, unless the contrary was established. It is urged that in such cases the law presumes that a fact continuous in its character continues to exist until the contrary is proved, and that there is a presumption that an instrument shown to have been executed continues in existence. This rule, however, has no application to an ambulatory instrument like a will or codicil. Indeed, as to such an instrument the presumption is the other way. It appears that a careful search was made among the papers and effects of the deceased and neither the will nor the codicil could be found. No testamentary papers having been found after a careful and exhaustive search, the presumption arises that the decedent herself destroyed the will and codicil *animo revocandi*. (*Betts v. Jackson*, 6 Wend. 173; *Collyer v. Collyer*, 110 N. Y. 481, 13 N. E. 110, 6 Am. St. Rep. 405; *Schultz v. Schultz*, 35 N. Y. 653, 91 Am. Dec. 88; *Knapp v. Knapp*, 10 N. Y. 276; *Hard v. Ashley*, 88 Hun. 103, 34 N. Y. Supp. 583; *Matter of Nichols*, 40 Hun. 387.)"

There was no proof adduced that the will was fraudulently destroyed in the testator's lifetime. Appellant attempted to show that it was fraudulently destroyed after Colbert's death by Woolbeater and others, presumably for the purpose of showing that the will was in existence at the time of Colbert's death. Of course, such testimony would have been competent, but appellant failed to show anything of the kind. He alleged that Woolbeater was a witness to the lost will. Woolbeater denied this, and said he never saw Colbert sign a will at any time. Appellant produced witnesses who swore that Woolbeater, while attending the funeral, said he had the Scheuer or lost will in his pocket at the time. This Woolbeater denied *in toto*. Appellant apparently places much reliance upon the evidence of

those who testify to these statements, but obviously this testimony could have but one effect—to impeach Woolbeater, or establish the fact that he had at different times made contradictory statements. It did not tend to prove even remotely that Woolbeater ever had possession of the so-called Scheuer will. It simply proved him unworthy of credit, and tended to show his statements, upon which appellant relied as establishing the existence of the will, to be unworthy of belief. No one ever saw the will in Woolbeater's possession, so far as the testimony discloses.

Now, as we have heretofore seen, the statute is to the effect that the proponent of a lost will must prove either that the will was actually in existence at the time of the testator's death, or that it is in existence in contemplation of law. If it was fraudulently destroyed in his lifetime, it is still so in existence. If appellant cannot prove that the will was in existence, either actually or in contemplation of the law, at the time Colbert died, it follows that his case cannot stand. In order to overcome the presumption of revocation which follows from the fact that the will was last seen in Colbert's possession when he was in possession of his mental faculties, appellant introduced certain declarations of Colbert's in conjunction with the testimony of witnesses who had seen the will, to the effect that Colbert said he was well satisfied with it. As this question is one of first impression in this court, we deem it necessary to examine it at some length. A respectable line of authorities holds that such declarations are competent as tending to show that, the will being in existence, and the testator being satisfied with it, it is not likely that he destroyed it; in other words, that he would be likely to follow out the inclinations which he had always expressed with respect to it. Nothing can be founded upon a more insecure basis. The will is, according to law, of an ambulatory character. No one except the testator has any rights in it whatsoever. No other person can have any rights in it until the testator is dead. He may change it at pleasure, and human experience has shown that wills are almost always destroyed secretly.

It seems to us that the better line of authorities is to the effect that such declarations are not admissible at all unless they are a part of the *res gestae*, and are introduced simply to show the mental condition of the testator when he did the thing which is being inquired into; that is, either when he executed the will or when he destroyed it. If any other rule is followed, it may result in this: A testator makes a will in the presence of witnesses. It is executed with all the formalities of law. These witnesses remember its contents. Other witnesses see it. The testator has expressed himself at various times as being satisfied with it. Then he secretly destroys it. In order that such will be admitted to probate after the death of the testator, it would only be necessary to have these different witnesses testify to the facts touching its execution, etc., and thus the intention of the testator as to the disposal of his property would be thwarted. It would impose upon a testator the necessity of revoking his will with as much publicity as that with which he created it, and the clause of the statute which provides that a testator may revoke his will by destroying it might be made nugatory in a given instance.

In the case of *Throckmorton v. Holt*, 180 U. S. 552, 21 Sup. Ct. 474, 45 L. Ed. 663, the court, speaking through Mr. Justice Peckham, says: "After much reflection upon the subject, we are inclined to the opinion that not only is the weight of authority with the cases which exclude the evidence both before and after the execution, but the principles upon which our law of evidence is founded necessitate that exclusion. The declarations are purely hearsay, being merely unsworn declarations, and, when no part of the *res gestae*, are not within any of the recognized exceptions admitting evidence of that kind. Although in some of the cases the remark is made that declarations are admissible which tend to show the state of the affections of the deceased as a mental *condition*, yet they are generally stated in cases where the mental *capacity* of the deceased is the subject of the inquiry, and in those cases his declarations on that subject are just as likely to aid in answering the question as to

mental capacity as those upon any other subject. But if the matter in issue be not the mental capacity of the deceased, then such unsworn declarations, as indicative of the state of his affections, are no more admissible than would be his unsworn declarations as to any other fact.

“When they are not a part of the *res gestae*, declarations of this nature are excluded, because they are unsworn, being hearsay only, and where they are claimed to be admissible on the ground that they are said to indicate the condition of mind of deceased with regard to his affections, they are still unsworn declarations, and they cannot be admitted if other unsworn declarations are excluded. In other words, there is no ground for an exception in favor of the admissibility of declarations of a deceased person as to the state of his affections, when the mental or testamentary capacity of the deceased is not in issue. \* \* \* The law cannot, therefore, be regarded as settled in England that, even in the case of a lost will, declarations of the testator made after its execution are to be admitted as evidence of its contents. It is also proper to call attention to the fact that all the judges participating in the decision of *Sugden's Case* were entirely satisfied with the proof of the contents of the lost will, wholly aside from evidence of these declarations. While the case is not like the one before us, inasmuch as the inquiry here is not in regard to the contents of a lost will, yet it might, perhaps, be urged with some force that, if declarations of that kind were admissible, the evidence now before us is competent, and was properly admitted. We are, however, convinced that the true rule excludes evidence of the kind we are considering. We remain of the opinion that the declarations come within no exception to the law excluding hearsay evidence upon the trial of an action, and we think the exceptions should not be enlarged to admit the evidence. Where the issue is not one in regard to the mental capacity of the alleged testator to make a will, his declarations upon the subject cannot be said to be declarations made against interest, such as declarations made by an individual while in possession of property, in disparagement of his

absolute ownership. Such evidence has been admitted as declarations against interest, or as characterizing possession, but the same declarations, made after a conveyance of the land, would be inadmissible as mere hearsay, and in no degree as declarations against interest. Declarations made by an alleged testator before or after the date of the paper are not declarations against interest, because they can have no effect upon his interest. The will would not take effect until after his death, and before that time he could revoke it or make another, and it would still be immaterial evidence even if he did neither. \* \* \*

"No inference is generally more uncertain or unreliable than that which is sought to be drawn upon the question of the genuineness of a will from the alleged condition of a testator's mind towards relatives or others, as evidenced by his declarations. It is everyday experience that declarations of that nature are to the last degree unreliable as a basis for an inference as to probable testamentary disposition of property. Those who thought by reason of such declarations that they would certainly be remembered in the will of the testator are so frequently disappointed \* \* \* that it would seem exceedingly unsafe to permit a jury to draw an inference based upon such evidence, relative to the genuine character of the instrument propounded as a will."

Justice O'Brien, delivering the opinion, commenting on this case in *Re Kennedy's Will*, *supra*, said: "As I read that case, it is a decision of the highest court in the land that the declarations of the deceased, when not a part of the *res gestae*, are not admissible to prove the execution of a will or its revocation, or rebutting the presumption of revocation from the fact that no will is found after death."

And in the case of *In re Calkins*, 112 Cal. 296, 44 Pac. 577, the court said: "The respondent does not claim that there is any direct evidence in support of the verdict outside of the evidence of certain declarations of the testatrix. The evidence chiefly relied upon by him consists of certain declarations made by her, which were admitted in evidence over the objection of

the proponent. To the extent that these declarations at or prior to the making of the will afforded any evidence bearing upon the state of the testatrix's mind at the time of the execution of the will—her mental capacity, the condition of her mind toward the object of her bounty, as well as toward the persons by whom she was surrounded, and the correspondence of her acts with the feelings and purposes entertained by her at the time she executed the will—they were properly admitted, and were entitled to consideration by the jury; but to the extent that they purported to be declarations of the acts of others, or of her own acts, they were but matters of hearsay merely, whose truth rested in the veracity of the utterer, and upon which there was no opportunity of cross-examination or of explanation by the party who had uttered them, and were not entitled to any weight by the jury, and cannot be considered for the purpose of sustaining their verdict. (*Shailer v. Bumstead*, 99 Mass. 112; *Potter v. Baldwin*, 133 Mass. 427; *Bush v. Bush*, 87 Mo. 480; *Jones v. Roberts*, 37 Mo. App. 163; *Waterman v. Whitney*, 11 N. Y. 157, 62 Am. Dec. 71; *Marx v. McGlynn*, 88 N. Y. 357; *Matter of Palmateer*, 78 Hun. 43, 28 N. Y. Supp. 1062; *Griffith v. Diffenderffer*, 50 Md. 466.)” (*Wells v. Wells*, 144 Mo. 198, 45 S. W. 1095.)

It thus appears that appellant's case, upon this phase of it, was wholly insufficient to overcome the presumption of revocation.

One of the grounds stated by appellant in the notice of intention to move for a new trial was that of newly discovered evidence, which could not with reasonable diligence have been discovered and produced at the trial. In support of this ground he filed the affidavit of one John Kempfer, who stated, in substance, that he was a resident of Butte, and was acquainted with Charles Colbert for several years prior to his death; that Colbert had shown him a will, signed by Colbert as testator and by John Woolbeater and William Ackerman as witnesses, in which Frederick Scheuer and Lillian E. Burton were the beneficiaries; that affiant was familiar with its contents, substantially; that

prior to the time of the death of Colbert affiant went from Butte to East Helena, where he remained until about the 8th of March, 1901, which was subsequent to the death of Colbert; that upon his return to Butte he occupied a house on the Emory placer claim, the property of Colbert, near a cabin occupied at that time by Woolbeater; that shortly after his return from East Helena, and after the date of his occupation of the house on the Emory placer, Woolbeater called upon him, and in a conversation concerning the death of Colbert he asked Woolbeater what had become of the will made by Colbert during the year 1896, in which Frederick Scheuer and Lillie Burton were named as beneficiaries, and that thereupon Woolbeater withdrew the will from his pocket, and showed it to affiant, who thereupon read it over, and saw that it was the same paper which had been shown to him by Colbert; that it was in the same condition as when last shown to him by Colbert, and bore the genuine signature of Charles Colbert as testator and the names of John Woolbeater and William Ackerman as witnesses; that the said paper was dated in the year 1896, written with a pen and ink upon ordinary legal cap paper, and was the same paper that had been previously shown to him. He further deposed that he had never mentioned the matters contained in his affidavit to any one until after the trial of this action, and said that the paper was in existence at least three weeks or a month subsequent to the death of Colbert, being in the possession of Woolbeater, intact, at that time.

In support of this affidavit appellant filed an affidavit in which he deposed that he had discovered the evidence stated in the affidavit of Kempfer since the trial; that he was unable to discover it prior to the trial, "although he had inquired of different persons living in the vicinity, and of every person who he thought had any knowledge of the facts or circumstances concerning the death of Colbert, as to whether the said will offered by him for probate was in existence at and subsequent to the date of Colbert's death, but that he was unable to discover any other evidence than that which was offered upon the trial."



The affidavit shows that appellant has been diligent in procuring evidence—in fact, has done all in his power to procure it; that the new evidence offered was upon a material matter; that it was not cumulative, and not of an impeaching nature. Indeed, it was the very essential evidence which the appellant lacked at the trial, and by reason of the absence of which he was unable to proceed with his proof. In appellant's affidavit he also averred that he could produce the said Kempfer as a witness upon the trial, and that Kempfer would testify to the facts alleged in his affidavit. We cannot say that the new evidence will not probably change the result if a new trial is granted. The witness Lillian Fluke, nee Lillian Burton, made an affidavit to the same effect as that of appellant. The state made no attempt to contradict these affidavits in any way. They stand admitted in the record, and import verity. With this uncontradicted showing upon a matter of the utmost materiality, we think the court abused its discretion in not granting the motion for a new trial.

Many other errors are assigned by appellant, but, in view of what has been said in the foregoing, we do not think it necessary to discuss them.

For the reasons given, we think the judgment and order should be reversed, and the cause remanded for a new trial.

PER CURIAM.—For the reasons given in the foregoing opinion, the judgment and order are reversed, and the cause is remanded.

*Reversed and remanded.*

Rehearing granted January 23, 1905.

#### ON REHEARING.

(Submitted March 14, 1905. Decided March 31, 1905.)

**New Trial—Newly Discovered Evidence—Affidavits—Insufficiency.**

1. The affidavit of proponent in support of a motion for a new trial on the ground of newly discovered evidence, in proceedings to establish a lost will, averred that since the dismissal of his petition he had discovered a witness

who would testify that he was shown the will by testator, and that he saw it after his death; that proponent was unable to discover the evidence prior to the trial, although he had inquired of different persons living in the vicinity, and every person whom he thought had any knowledge of the circumstances. The affidavit of the witness in question showed that prior to the death of testator he left the vicinity, but returned after testator's death and occupied a house on testator's property. It did not appear how the evidence was discovered, or that the witness had not lived in the vicinity from a few weeks after testator's death to the time of the trial. *Held*, that there was not a sufficient showing of diligence on the part of the movant to entitle him to a new trial.

**New Trial—Newly Discovered Evidence—Presumption—Negligence.**

2. Every presumption that he could have secured the testimony for the former trial will be indulged against the movant for a new trial on the ground of newly discovered evidence; hence he must negative any negligence on his part.

**New Trial—Newly Discovered Evidence—Affidavit—Particularity.**

3. Affidavits filed in support of a motion for a new trial on the ground of newly discovered evidence should state with particularity what was done toward obtaining the new evidence, and how and when it was discovered, so as to give the adverse party an opportunity to traverse the statements made in the affidavit.

**New Trial—Newly Discovered Evidence—Affidavit—Insufficiency.**

4. A statement in an affidavit filed in support of a motion for a new trial on the ground of newly discovered evidence, that the movant has made inquiry of every person he thought might know anything about the case, is insufficient.

**New Trial—Newly Discovered Evidence—Duty of Trial Court.**

5. It is incumbent upon the trial court, on the hearing of a motion for a new trial on the ground of newly discovered evidence, to take into consideration the weight and importance of the new evidence, its bearing in connection with the evidence on the former trial, and even the credibility of the witnesses.

**New Trial—Newly Discovered Evidence—Cumulative—Different Result on Re-Trial.**

6. A motion for a new trial on the ground of newly discovered evidence will not be granted, unless it clearly appears that such evidence is not cumulative merely, but makes it clearly probable that it will produce a different result on re-trial.

**New Trial—Newly Discovered Evidence—Trial Court—Presumptions.**

7. The trial court, having heard the testimony given by the witnesses *ore tenus* and observed their conduct and demeanor on the witness stand, is in a better position to weigh it than is the appellate court, and the presumption will be indulged, in the absence of any showing to the contrary, that its action in passing upon a motion for a new trial on the ground of newly discovered evidence, was based upon a due consideration of these conditions.

**New Trial—Newly Discovered Evidence—Trial Court—Discretion.**

8. Applications for new trials on the ground of newly discovered evidence are addressed to the sound, legal discretion of the trial judge, and his action thereon will not be disturbed on appeal, except for a clear and unmistakable abuse of such discretion.

MR. COMMISSIONER CLAYBERG prepared the opinion for the court.

Upon the original hearing of this case the court decided that the affidavits of newly discovered evidence were of such charac-

ter as to warrant the granting to appellant of a new trial in the court below. The court, upon motion, granted a rehearing upon this point alone. Upon the rehearing, counsel for the state take the position that these affidavits are insufficient to entitle appellant to a new trial. It is but fair to the court, and to the commissioner who prepared the former opinion, to say that the attorneys for the state on the former argument treated the question of the sufficiency of these affidavits very briefly. Had they then made as full a presentation of this question as they do now, the result would have been different. The record on appeal is very voluminous, and we were not aided in its examination upon this point by such references thereto as are now presented. For this reason the record was misapprehended in some respects, and some of the language of the opinion was not sufficiently guarded.

The affidavit of John Kempfer is as follows: "John Kempfer, being first duly sworn, on oath deposes and says that he is a resident of Butte City, Silver Bow county, Montana, and that he was acquainted with Charles Colbert for several years prior to his death; that, on several occasions prior to the death of said decedent, said decedent had spoken to him about a certain will which he, the said decedent, had executed during the year 1896, in which said will Frederick W. Scheuer and Lillian E. Burton, now Lillian E. Fluke, were the sole beneficiaries, and that the said will was signed by the said Charles Colbert and by John Woolbeater and William Ackerman as witnesses; that the said decedent, Colbert, had conversed with this affiant on several occasions concerning the said will during his lifetime, and had shown the same to him; and that this affiant was familiar with its contents, substantially, by reason of the fact of the said Colbert's having shown the same to him, and having seen the same, together with the names of the persons attached thereto as witnesses, in addition to the name of the said Charles Colbert. Affiant further says that, some time prior to the death of the said Charles Colbert, he left the city of Butte, Montana, and removed to East Helena, in Lewis and Clarke county, in said

state, and remained there until about the 8th day of March, A. D. 1901, which was subsequent to the date of said Charles Colbert's death; that upon his return he occupied a house on a portion of the Emory placer claim, the property of the said Charles Colbert, near a certain house or cabin occupied at that time by John Woolbeater, the proponent of the so-called Woolbeater-Lippincott will in this cause; that a short time after his return from East Helena, and after the date of his occupation of said house on the said Emory placer claim, the said John Woolbeater called on him, and, in a conversation concerning the death of Charles Colbert, which had previously occurred, this affiant asked the said Woolbeater, in substance, what had become of the will made by Colbert during the year 1896, in which the said Frederick W. Scheuer, or Freddie Scheuer, and Lillian E. Burton, or Lillie Burton, were named as beneficiaries, and that thereupon the said Woolbeater withdrew the said will from his pocket and showed it to this affiant, who thereupon looked at it, read it over, and saw that it was the same paper which had been shown to him by the said Colbert during his lifetime, and was in the same condition as when last shown to him by the said Charles Colbert previous to his death, said paper bearing the genuine signature of Charles Colbert as testator, and the names of John Woolbeater and William Ackerman as witnesses. Affiant further says that the said paper was dated in the year 1896, and was signed as hereinbefore stated, and was written with a pen and ink upon ordinary legal-cap paper, and was the same paper that had been previously shown to him. Affiant further says that he never mentioned said matters to any one until after the trial of the above action. Affiant further says that the said paper was in existence, as hereinabove stated, at least three weeks or a month subsequent to the date of Charles Colbert's death, and was in the possession of said John Woolbeater, intact, at that time."

The affidavit of Frederick W. Scheuer is as follows: "Frederick W. Scheuer, being first duly sworn, deposes and says that he is one of the contestants of the so-called Woolbeater-Lippin-

cott will, offered for probate in the above-entitled action, and that he is the proponent of the so-called Scheuer-Fluke will, which was offered for probate as a lost will in the said cause; that since the date of the said trial, and the dismissal of his petition to have the said lost will probated, he has discovered evidence as to the existence of said will subsequent to the death of said Charles Colbert, deceased, which said evidence he was unable to discover prior to the time of said trial, and the dismissal of his petition and contest, although he had inquired of different persons living in the vicinity, and every person whom he thought had any knowledge of the facts or circumstances surrounding the death of said Charles Colbert, and as to whether or not the said will offered by him for probate was in existence at and subsequent to the date of his said death; that he was unable to discover any other evidence than that which was offered upon the trial. Affiant further says that since the date of said trial he has discovered that John Kempfer, an acquaintance of said Charles Colbert, deceased, and also of said John Woolbeater, saw the will offered by this affiant for probate in the possession of said John Woolbeater about three weeks or a month subsequent to the date of said Colbert's death; that the said Woolbeater showed the said will to the said Kempfer, and that the said Kempfer recognized the same as being the will which had been shown to him by Charles Colbert during his lifetime; and that the said Kempfer had read the said will previous to the death of said Charles Colbert, and had seen the signatures attached thereto, and was familiar with the contents thereof, as this affiant is informed and believes. Affiant further says that the said Kempfer never told him, or any one representing him, prior to the date of said trial, or prior to the date of the dismissal of affiant's petition to have the said lost will probated, that he had any knowledge concerning the execution, existence or possession of said will by Woolbeater subsequent to Colbert's death, and that therefore he could not produce the said witness upon the trial of said cause, or produce his evidence. Affiant further says that he herewith presents, as part of his

motion for a new trial, the affidavit of the said John Kempfer, showing the facts that he is familiar with concerning the execution of said will by the said Charles Colbert during his lifetime, and showing the conversation had by Kempfer with Colbert concerning the same, and showing the existence of the said will subsequent to Colbert's death, the same being in the possession of John Woolbeater subsequent to said time. Affiant further says that, if a new trial is granted in this cause, he can produce the said John Kempfer as a witness upon the trial hereof, and produce evidence showing the facts stated in the affidavit of said John Kempfer, herewith filed, and referred to in support of affiant's motion for a new trial, and that he can also show by the said witness that the said will was in existence subsequent to the date of the death of Charles Colbert. Wherefore affiant asks that a new trial be granted in this cause."

The affidavit of Mrs. Fluke was identical with the affidavit of Scheuer, above quoted, and need not herein be set forth.

Before considering the affidavit of Kempfer, it is necessary to ascertain whether, by the affidavits of appellants, reasonable diligence is shown on their part to discover before the former trial the testimony which they say Kempfer will now give. A careful consideration of the contents of these affidavits, and the adjudications of our own and various courts of last resort, leads us irresistibly to the conclusion that they do not disclose the exercise of such diligence as is contemplated by Section 1171 of the Code of Civil Procedure. We lately had occasion to investigate the question of reasonable diligence in a case of similar character, and, after citing numerous authorities, we announced the following rule: "Under these authorities, it was incumbent upon plaintiffs to show that they had been guilty of no laches, and that failure to produce the evidence on the trial could not be imputable to lack of diligence on their part. They must make strict proof of diligence, and a general averment of its existence is insufficient. Whether reasonable diligence has been used is a question to be determined by the court upon the affidavits presented, and therefore these affidavits should state with particu-

larity what acts were performed. They should show what diligence was used, how the new evidence was discovered, why it was not discovered before the trial, and such other facts as make it clear that the failure to produce the evidence was not their own fault, or because of want of diligence on their part." (*Nicholson v. Metcalf*, 31 Mont. 276, 78 Pac. 483.)

The movant for a new trial on the ground of newly discovered evidence must set forth such facts as will enable the court to determine whether reasonable diligence was exercised. Every presumption that he could have secured the testimony for the former trial will be indulged against him. He must therefore negative any negligence. The question being one for the court, as to whether reasonable diligence was exercised, and this question having to be determined upon the affidavits filed, great care should be exercised in their preparation. They should set forth such facts as will enable the court to determine whether reasonable diligence was exercised. They should state in detail and with particularity what was done by the parties with reference to obtaining the new evidence, how and when it was discovered, etc., and thus give the adverse party the opportunity to traverse the statements if desirable. The reason of this rule is well stated in *Baker v. Joseph*, 16 Cal. 173: "The temptations are so strong to make a favorable showing, after a defeat in an angry and bitter controversy involving considerable interests, and the circumstance that testimony has just been discovered, when it is too late to introduce it, so suspicious, that courts require the very strictest showing to be made of diligence and all other facts necessary to give effect to the claim."

The affidavit of Scheuer discloses that since the former trial "he has discovered evidence as to the existence of said will subsequent to the death of said Charles Colbert, deceased, which said evidence he was unable to discover prior to the time of said trial, \* \* \* although he had inquired of different persons living in the vicinity, and every person whom he thought had any knowledge of the facts or circumstances surrounding the death of said Charles Colbert, and as to whether or not the said

will offered by him for probate was in existence at and subsequent to the date of his said death; that he was unable to discover any other evidence than that which was offered upon the trial." This affidavit further discloses "that the said Kempfer never told him, or any one representing him, prior to the date of said trial, or prior to the date of the dismissal of affiant's petition to have the said lost will probated, that he had any knowledge concerning the execution, existence or possession of said will by Woolbeater subsequent to Colbert's death, and that therefore he could not produce the said witness upon the trial of said cause, or produce his evidence." As above stated, the affidavit of Mrs. Fluke is identical with that of Scheuer. This is the only showing of exercise of reasonable diligence that is found in the affidavits.

It is well settled that a statement in an affidavit that the party has made inquiry of every person he thought might know anything about the case is insufficient. (*Smith v. Williams*, 11 Kan. 104; *Patterson v. Collier*, 77 Ga. 292, 3 S. E. 119; *Toney v. Toney*, 73 Ind. 34; *Flersheim M. Co. v. Gillespie*, 14 Okl. 143, 77 Pac. 183; *Keisling v. Readle*, 1 Ind. App 240, 27 N. E. 583; *Richter v. Meyers*, 5 Ind. App. 33, 31 N. E. 582; *Hines v. Driver*, 100 Ind. 315.) The opinion in the last case cited is very exhaustive and very able, and we refer to it for a full discussion of the point under consideration.

It will be noticed that there is no showing that Kempfer did not live in the immediate vicinity of the residence of Colbert for a time commencing a few weeks after his death up to the trial of the case. He states in his affidavit that he returned to Butte about the 8th day of March, 1901, and resided on the property formerly owned by Mr. Colbert. Appellants show no excuse for not inquiring of him what he knew in regard to the matter, if anything, or that they were not aware of his residence in the vicinity. To use the language of the Supreme Court of Indiana: "For all we know, from his affidavit, the two persons whose affidavits he produces may have been his nearest neighbors and his intimate friends, with whom he had frequently had



consultations about the case." (*Graham v. Payne*, 122 Ind. 403, 24 N. E. 216.) It is not shown how soon after the trial, or by what means, this evidence was discovered. It may have been discovered by the diligence of appellants or their attorneys, spurred on by defeat, soon after the trial. If this is true, they might possibly have discovered it before the trial, by the exercise of the same diligence. (*Kansas City M. & B. R. Co. v. Phillips*, 98 Ala. 159, 13 South. 65.)

The facts set forth in the affidavit of Kempfer are contradicted in some respects by the testimony given at the trial. When the motion for a new trial was presented to the court below, there was before that court for consideration all the evidence given on the trial of the case, and in this evidence we find the contradictions above referred to. Therefore the language used in the former opinion that these affidavits are uncontradicted and import verity is not sustained by the record.

It was the duty of the trial court, on the hearing of the motion for a new trial, "to take into consideration the weight and importance of the new evidence, its bearing in connection with the evidence on the former trial, and even the credibility of the witnesses." (*State v. Stain*, 82 Me. 472, 20 Atl. 72; *Leyson v. Davis*, 17 Mont. 220, 293, 42 Pac. 775, 31 L. R. A. 429.) But again, a motion for a new trial should not be granted on newly discovered evidence unless such evidence makes it clearly probable that it will produce a different result on the retrial. (*State v. Hardee*, 28 Mont. 18, 72 Pac. 39.) While this rule was doubtless in the mind of the writer of the opinion upon the former hearing of this case, it is not stated with exactness, but in language which might mislead.

In *Commonwealth v. Flanagan*, 7 Watts & S. 415, the Supreme Court of Pennsylvania say: "After verdict, when the motion for a new trial is considered, the court must judge, not only of the competency, but of the effect of evidence. If, with the newly discovered evidence before them, the jury ought not to come to the same conclusion, then a new trial may be granted; otherwise they are bound to refuse the application. And in

*Lewellen v. Parker* [4 Ohio, 5] it is ruled that in considering the motion, the court will not inquire whether, taking the newly discovered testimony in connection with that exhibited on the trial, a jury *might* be induced to give a different verdict; but whether the legitimate effect of such evidence would *require* a different verdict. The question, therefore, is (supposing all the testimony, new and old, before another jury) not whether they *might*, but whether they ought to, give another verdict." This language is quoted with approval by the Supreme Court of Maine in *State v. Stain, supra*, and a long list of authorities is cited, supporting the doctrine. While the rule thus stated is more stringent than the one we have adopted, the quotation has been given to show the position of other courts.

The court below heard the testimony given on the trial from the mouths of the witnesses, observed their conduct and demeanor on the witness stand, and had better means of weighing the testimony than this court possesses. It is to be presumed, in the absence of any showing to the contrary, that the court below considered all these conditions in passing upon the motion for a new trial.

One singular circumstance referred to in the affidavit of Kempfer deserves attention in this connection. He states that one Woolbeater showed him the Colbert will, made in favor of appellants, after March 8, 1901, and subsequent to Colbert's death. The record discloses that prior to this time, and on February 21, 1901, Woolbeater had filed a will for probate purporting to have been executed by Colbert in his own and Lippincott's favor, and the petition for such probate had not been heard. This statement strikes us as being so unreasonable that it is not worthy of belief, and we are inclined to think that, in all probability, a jury, in passing upon its truth, would be impressed in the same manner. We cannot say, from an examination of the record, that a different result would have been clearly probable, had the new trial been granted.

Applications for new trial on the ground of newly discovered evidence are addressed to the sound legal discretion of the trial

judge, and his action thereon will not be disturbed on appeal, except for a clear and unmistakable abuse of such discretion. This court, in *State v. Brooks*, 23 Mont. 146, 161, 57 Pac. 1038, 1043, quotes with approval the following language from *People v. Demasters*, 109 Cal. 607, 42 Pac. 236: "We can see no abuse of discretion on the part of the court below in denying defendant's motion for a new trial, made upon the ground of newly discovered evidence. As has been repeatedly held by this court, a motion for a new trial is addressed to the sound legal discretion of the trial court, and the action of the latter will not be disturbed, except in an instance manifesting a clear and unmistakable abuse of such discretion. This rule is peculiarly applicable to an application based upon the ground of newly discovered evidence, which not only involves an enlarged discretion in the trial court, but has never been looked upon with favor, but rather with distrust. (*Hobler v. Cole*, 49 Cal. 250; *Arnold v. Skaggs*, 35 Cal. 684.) To entitle the plaintiff to a new trial on this ground, it must appear, among other things, that the new evidence be not cumulative, merely; that it be such as to render a different verdict reasonably probable upon a retrial; and that the evidence could not with reasonable diligence have been discovered and produced at the trial. 1 Hayne on New Trial and Appeals, Sec. 88." (See, also, *Murray v. Heinze*, 17 Mont. 353, 358, 359, 42 Pac. 1057, 43 Pac. 714.)

We are therefore of the opinion that the judgment and order appealed from be affirmed, and so advise.

PER CURIAM.—For the reasons stated in the foregoing opinion, the judgment and order are affirmed.

*Affirmed.*

SILVER CAMP MINING COMPANY ET AL., RESPONDENTS, v. DICKERT, APPELLANT.

(No. 2,014.)

(Submitted November 17, 1904. Decided December 24, 1904.)

*Process—Specific Performance—Service by Publication—Non-residents—Actions in Personam.*

**Specific Performance—Action in Personam.**

1. An action for specific performance of a contract to convey real estate is a proceeding *in personam*.

**Actions in Personam—Summons by Publication—Common Law Rule.**

2. Service of summons by publication on a nonresident defendant under Code of Civil Procedure, Section 638, will not warrant a judgment *in personam* against defendant who appears specially to challenge the jurisdiction of the court.

**Action in Personam—Summons by Publication—Common Law Rule.**

3. A general statute providing for the publication of summons in civil actions (Code of Civil Procedure, Section 637) does not abrogate the common law rule which requires personal service of summons in actions *in personam*.

*Appeal from District Court, Lewis and Clarke County; Henry C. Smith, Judge.*

ACTION by the Silver Camp Mining Company and another against Ferdinand Dickert. From a judgment for plaintiffs, defendant appeals. Reversed.

Mr. T. J. Walsh, for Respondents.

Appellant contends that an action for the specific performance of a contract is an action *in personam*, not *in rem*, and that substituted service, as by publication or personal service without the state, can be had so as to bind the property which is the subject of the action only in actions *in rem*, not in actions *in personam*. That such service will not support a judgment in an action brought solely to obtain a personal judgment, as for damages, may be conceded, as is doubtless established by the authorities; but it is equally well established that in actions

touching or affecting the title to property within the state, whether the same is made the subject of the action by virtue of the averments of the complaint or has been seized and held by virtue of the process of the court, service may be made by publication under statutes authorizing that procedure, and the judgment is effective in the state in which it is rendered in respect of the property thus brought before the court. It is true that an action for specific performance of a contract, when service is personal and within the state, is an action *in personam*. If the decree is for the plaintiff, the defendant will be commanded to execute a conveyance and he will be imprisoned by the court, as for contempt, if he refuses to comply, but it is undeniably within the power of the court, as it is the common practice sanctioned by this court, to provide in the decree that upon failure of the defendant to execute the conveyance, a commissioner appointed by the court execute it in its behalf, or it may provide that the title be quieted in the plaintiff as against any claims on the part of the defendant. (*Muller v. Buyck*, 15 Mont. 354; *Finlen v. Heinze*, 28 Mont. 548.)

There is no constitutional objection to service by publication in an action for specific performance. (*Boswell v. Otis*, 9 How. 336; *Seculovich v. Morton*, 101 Cal. 677; *O'Sullivan v. Overton*, 14 Atl. 300; *Mason v. Benedict*, 8 So. 931; *Porter v. Baskin*, 43 Fed. 323; *Perkins v. Wakeham*, 86 Cal. 580; *Loaiza v. Levy*, 24 Pac. 707; 20 Ency. Pl. and Pr. 409.)

The contention that, although the state might provide for service of publication in cases of specific performance, it can do so only by some special statute authorizing service by publication in cases of that character, and that the general statute for service by publication is ineffective to give validity to a judgment in an action for specific performance where the service has been made by publication, is refuted by the case of *Roller v. Holly*, 176 U. S. 398. Our statute is identical with that of California, held to warrant service by publication in an action for specific performance in *Seculovich v. Morton*, 101 Cal. 677, and in an action to quiet title in *Perkins v. Wakeham*,

*supra*. The argument of appellant that Section 637, Code of Civil Procedure, is too general in its nature to support a judgment on service by publication in an action for specific performance is met in the opinion in *Perkins v. Wakeham, supra*.

The inapplicability of the case of *Hart v. Sansom* to the question presented by this record is shown in *Lynch v. Murphy*, 161 U. S. 247; *Morris v. Graham*, 51 Fed. 56; *United States v. So. Pac.*, 63 Fed. 485; *Dillon v. Heller*, 18 Pac. 693.

Mr. William Wallace, Jr., and Messrs. Word & Word, for Appellant.

That this action was and is one *in personam* and not one *in rem* is clear from the authorities. (*Close v. Wheaton*, 65 Kan. 830, 70 Pac. 891; *Hart v. Sansom*, 110 U. S. 151, 154-5; *Viele v. Van Stenberg*, 31 Fed. 252-3; *Arndt v. Griggs*, 134 U. S. 316; *Massie v. Watts*, 6 Cranch. (U. S.) 159; *Benton v. Fenton*, 41 Fed. 283; *Roller v. Holly*, 176 U. S. 399; *Ormsby v. Ottman*, 85 Fed. 492; *Ins. Co. v. Lyons Co.*, 95 Fed. 331; *Cooper v. Newell*, 173 U. S. 567; *Cabane v. Graf*, 87 Minn. 513; *Davis v. Parker*, 14 Allen, (Mass.) 94, 98; *Bank of Huntington v. Henry*, 58 N. E. 1057, 1059; *Wood v. Warner*, 15 N. J. Eq. 81, 84-5; *Needham v. Thayer*, 147 Mass. 536; *Merrill v. Beckwith*, 163 Mass. 503; 1 Elliott's Gen. Pr. Secs. 244, 245; 1 Story's Eq. Jur. Sec. 744; *Pinney v. Ins. Co.*, 50 L. R. A. p. 577 and note; *Ellis v. McConnick*, 144 Mass. 10; *Fowler v. Fowler*, 204 Ill. 82; *Leigh v. Green*, 193 U. S. 191-2.)

MR. JUSTICE HOLLOWAY delivered the opinion of the court.

This is an action brought by the Silver Camp Mining Company and another against Ferdinand Dickert, to enforce the specific performance of a contract to convey certain real estate situate in Lewis and Clarke county, Montana, and to compel the defendant Dickert to make an assignment of certain dividends.

At the time this action was commenced, and, so far as this record shows, at all times therein mentioned, Dickert was not a resident of the state of Montana, he being a resident of the state of Utah. The plaintiffs made affidavit for publication of summons, secured an order to that effect, and then made service on the defendant in Utah under the provisions of Section 638 of the Code of Civil Procedure. The defendant appeared specially and challenged the jurisdiction of the court. This appeal is from the judgment.

Three questions are presented for solution: First. Is the action for specific performance of a contract to convey real estate one *in personam*? Second. Will service of summons by publication warrant a judgment *in personam*? Third. Does a general statute providing for the publication of summons in civil actions abrogate the common-law rule which requires personal service of summons in actions *in personam*?

1. As to the first question. Conceding that there may be some conflict in the authorities respecting this, the decided weight of authority is in favor of an affirmative answer, though the courts holding this view have not always been in harmony as to the reasons, or as to the extent to which the doctrine should be carried. As early as 3 Cushing this question was before the Supreme Court of Massachusetts, and, respecting it, that court said: "The simple question raised in the case is whether the court can proceed in this suit against the defendant, he not being at the commencement of the suit, or now, within the jurisdiction of this court, but being then and now an inhabitant of and within the state of Connecticut. This is strictly a proceeding *in personam*. There is but one person who is the party defendant, and he is not a passive party, but must be eminently active in the performance of any decree which may be made against him. The whole object of the bill is to compel the defendant to execute a conveyance of land, as is alleged, according to his contract." (*Spurr et al. v. Scoville*, 3 Cush. 578.) This doctrine is reaffirmed by the same court in *Davis v. Parker*, 14 Allen, (Mass.) 94, and *Merrill v. Beckwith*, 163 Mass. 503, 40 N. E. 855.

In *Close v. Wheaton*, 65 Kan. 830, 70 Pac. 891, it is said: "The character of an action for specific performance as *in personam* entirely is so well established that courts having jurisdiction of the parties frequently entertain suits to compel the execution of contracts for the conveyance of lands in other states, in which, of course, their decrees as to the *res* cannot operate. (*Lindley v. O'Reilly*, 50 N. J. Law, 636, 15 Atl. 379, 1 L. R. A. 79, 7 Am. St. Rep. 802.) Sometimes a question may exist as to whether the complaining party may not have such peculiar interest in the property as to entitle him to the enforcement of a trust, and not of contract merely (*Merrill v. Beckwith*, 163 Mass. 503, 40 N. E. 855), in which event the action might be local, and not transitory; but the plaintiffs in this case have neither stated in their pleadings, nor claimed before us, such character of right. We are therefore well convinced that the inherent nature of the ordinary proceeding to compel a vendor to comply with this contract, as contract, by the execution of a deed, makes the action one *in personam*, which can be brought only where the defendant resides or may be legally served with personal process."

The Supreme Court of Indiana, in *Coon v. Cook*, 6 Ind. 268, said: "For the reversal of this decree it is contended: (1) That the land in question, being in Hancock county, the circuit court of Henry county had no jurisdiction of the subject-matter in controversy. This objection is not tenable. We concur with the appellee's counsel that the present, being a suit for a specific performance of a contract, operates on the person, and may properly be instituted in any county where the contractor resides." This is approved and followed in *Dehart v. Dehart*, 15 Ind. 167.

In *McQuerry v. Gilliland*, 89 Ky. 434, 12 S. W. 1037, 7 L. R. A. 454, the court said: "The court is of the opinion that in case of fraud, of trust, or of contract, the jurisdiction of a court of chancery is sustainable wherever the person be found, although lands not within the jurisdiction of that court may be affected by the decree. In such case the subject-matter is not that



of the recovery of land. In other words, it is not an action *in rem*. The court need not have the land before it in order to be able to render a judgment; but the action is *in personam*, for the purpose of enforcing a personal obligation of contract or of trust. It is true that the title to land is to be affected by the decree, in so far as it compels the party to convey; but, as said, by reason of his trust or contract duty, he is personally obliged to convey, and that duty may be discharged in one state as well as another, although the land may not be situated in such state. It is the breach of trust or contract to convey that may be complied with, without regard to the location of the land, that gives the right of action *in personam*."

In *Brown v. Desmond*, 100 Mass. 267, the court said: "A suit for specific performance of a contract for the conveyance of land proceeds *in personam*." This doctrine is affirmed by the Supreme Court of Indiana in *Bethell v. Bethell*, 92 Ind. 318.

As if to place particular emphasis upon the view that an action to enforce the specific performance of a contract to convey land operates strictly *in personam*, the chancery courts in England and of many of the states in this country have repeatedly held that such an action may be commenced in, and relief had from, a court having jurisdiction of the parties, even though the land to be affected lies in another state or in a foreign country. (*Penn v. Lord Baltimore*, 1 Ves. 444; *Cranston v. Johnson*, 3 Ves. Jr. 170; *Ward v. Arredondo*, 1 Hopk. Ch. 213, 14 Am. Dec. 543; *Sutphen v. Fowler*, 9 Paige, 280; *Newton v. Bronson*, 13 N. Y. 587, 67 Am. Dec. 89; *Davis v. Headley*, 22 N. J. Eq. 115; *Massie v. Watts*, 6 Cranch. (U. S.) 148, 3 L. Ed. 181.)

The doctrine is broadly stated by Story as follows: "The proposition may therefore be laid down in the most general form, that, to entitle a court of equity to maintain a bill for the specific performance of a contract respecting land, it is not necessary that the land should be situate within the jurisdiction of the state or country where the suit is brought. It is sufficient

that the parties to be affected and bound by the decree are resident within the state or country where the suit is brought, for in all suits in equity the primary decree is *in personam* and not *in rem*. The incapacity to enforce the decree *in rem* constitutes no objection to the right to entertain such a suit." (1 Story's Equity Jurisprudence (10th Ed.) Sec. 744; *Brown v. Desmond*, *supra*; Elliott on General Practice, Sec. 244; *Close v. Wheaton*, *supra*.)

As further illustrating the view that this character of action is purely *in personam*, and that a statute of the character of our Section 610 of the Code of Civil Procedure has no application to an action to enforce the specific performance of a contract for the conveyance of real estate, the Supreme Court of Washington, in *Morgan v. Bell*, 3 Wash. St. 554, 28 Pac. 925, 16 L. R. A. 614, said: "The first point argued by the appellant is that this is an action affecting the title to real estate, and should have been brought in Clallam county, where the land is situated, by virtue of Section 47 of the Code, which provides that actions for the recovery of, for the possession of, for the partition of, for the foreclosure of a mortgage on, or for the determination of all questions affecting the titles, or for any injuries to, real property, shall be commenced in the county or district in which the subject of action, or some part thereof, is situated. We do not think this is the character of cases contemplated by the statute. The title to this land was not in dispute, and could not be affected by the decree of the court, under the pleadings. It is true that the court could decree a specific performance of the contract, under the allegations of the complaint, but it would be a decree affecting the parties to the action personally. It would not determine any question affecting the title, in the sense in which the word 'title' is evidently employed in the statute."

For the purpose of differentiating between the legal effects which flow from that class of actions wherein service of summons may be properly made by publication and actions strictly *in personam*, reference is had to the language used by the supreme court in *Cooper v. Reynolds*, 10 Wall. (U. S.) 308, 19 L. Ed.

931. The court there had under consideration an action which grew out of an action for damages, wherein summons had been served by publication, and in which property of one of the defendants which was within the jurisdiction of the court had been seized by attachment and sold under execution to Cooper. The original owner of the property, who was a defendant in that action, then brought ejectment against Cooper, who asserted title under the sheriff's deed. After reviewing the proceedings had in the original action for damages, the court carefully reviewed the whole subject, and announced a rule which has since been followed. The court said: "But the plaintiff is met at the commencement of his proceedings by the fact that the defendant is not within that territorial jurisdiction, and cannot be served with any process by which he can be brought personally within the power of the court. For this difficulty the statute has provided a remedy. It says that, upon affidavit being made of that fact, a writ of attachment may be issued and levied on any of the defendant's property, and a publication may be made warning him to appear, and that thereafter the court may proceed in the case, whether he appears or not. If the defendant appears, the cause becomes mainly a suit *in personam*, with the added incident that the property attached remains liable, under the control of the court, to answer to any demand which may be established against the defendant by the final judgment of the court. But if there is no appearance of the defendant, and no service of process on him, the case becomes, in its essential nature, a proceeding *in rem*, the only effect of which is to subject the property attached to the payment of the demand which the court may find to be due to the plaintiff. That such is the nature of this proceeding in this latter class of cases is clearly evinced by two well-established propositions: First, the judgment of the court, though in form a personal judgment against the defendant, has no effect beyond the property attached in that suit. No general execution can be issued for any balance unpaid after the attached property is exhausted. No suit can be maintained on such a judgment in the same court or any

other, nor can it be used as evidence in any other proceeding not affecting the attached property, nor could the costs in that proceeding be collected of defendant out of any other property than that attached in the suit. Second, the court, in such a suit, cannot proceed unless the officer finds some property of defendant on which to levy the writ of attachment. A return that none can be found is the end of the case, and deprives the court of further jurisdiction, though the publication may have been duly made and proven in court."

2. As to the second question. If any doubt existed respecting the proper answer to be made to this inquiry, that doubt was settled by the Supreme Court of the United States in *Pennoyer v. Neff*, 95 U. S. 714, 24 L. Ed. 565. In 1866 J. H. Mitchell obtained a judgment in the district court of Oregon against Neff, a nonresident of Oregon, for services alleged to have been rendered to Neff. Summons was served by publication, and Neff did not appear. Judgment was rendered by default. Execution was issued, and land belonging to Neff in Oregon was levied upon and sold to Pennoyer. Neff later returned and brought ejectment against Pennoyer, who pleaded title in himself, based upon the deed which he had received from the sheriff by virtue of the execution sale in *Mitchell v. Neff*. The validity of the judgment in *Mitchell v. Neff* was put directly in issue. Respecting the doctrine that a personal judgment can only be had after personal service of the defendant or his voluntary appearance in the action, the court said: "It is the only doctrine consistent with proper protection to citizens of other states. If, without personal service, judgments *in personam*, obtained *ex parte* against nonresidents and absent parties, upon mere publication of process, which, in the great majority of cases, would never be seen by the parties interested, could be upheld and enforced, they would be the constant instruments of fraud and oppression. Judgments for all sorts of claims upon contracts and for torts, real or pretended, would be thus obtained, under which property would be seized, when the evidence of the transactions upon which they were founded, if they ever had any existence, had

perished. Substituted service by publication, or in any other authorized form, may be sufficient to inform parties of the object of proceedings taken, where property is once brought under the control of the court by seizure or some equivalent act. The law assumes that property is always in the possession of its owner, in person or by agent; and it proceeds upon the theory that its seizure will inform him, not only that it is taken into the custody of the court, but that he must look to any proceedings authorized by law upon such seizure for its condemnation and sale. Such service may also be sufficient in cases where the object of the action is to reach and dispose of property in the state, or of some interest therein, by enforcing a contract or a lien respecting the same, or to partition it among different owners, or, when the public is a party, to condemn and appropriate it for a public purpose. In other words, such service may answer in all actions which are substantially proceedings *in rem*. But where the entire object of the action is to determine the personal rights and obligations of the defendants—that is, where the suit is merely *in personam*—constructive service in this form upon a nonresident is ineffectual for any purpose.”

*Pennoyer v. Neff*, *supra*, is directly approved and followed by the supreme court in *Hart v. Sansom*, 110 U. S. 151, 3 Sup. Ct. 586, 28 L. Ed. 101, and the doctrine of that case reannounced in *Leigh v. Green*, 193 U. S. 79, 24 Sup. Ct. 390, 48 L. Ed. 623. That doctrine has also been followed by the courts of last resort of several states where it has been in issue.

In *Eliot v. McCormick*, 144 Mass. 10, 10 N. E. 705, it is said: “The Supreme Court of the United States has held, in recent decisions, that under this provision it is not competent for a state court to render a judgment *in personam* against a person who is not a resident of the state, who does not appear in the suit, and who is not served personally with process within the state. It is held that, where property of a nonresident defendant is found within the state, the state court may attach it on the writ, and may proceed to a judgment so far as to apply the property to the debt; but if there is no appearance of the de-

defendant, and no personal service on him, a judgment rendered against him personally is void, and has no effect beyond the property attached, and no suit can be maintained on such a judgment, either in the same or any other court. (*Pennoyer v. Neff*, 95 U. S. 714, 24 L. Ed. 565; *Freeman v. Alderson*, 119 U. S. 185, 7 Sup. Ct. 165, 30 L. Ed. 372.)"

In *Needham v. Thayer*, 147 Mass. 536, 18 N. E. 429, the views of the court in *Eliot v. McCormick*, above, were adopted and followed, and it is there held that a judgment *in personam* against a person who is not a resident of the state in which the judgment is rendered, who has not been *personally* served in the state with summons, and who has not appeared in the action, is wholly void, and no suit can be maintained on it either in that or any other court; that the court obtained no jurisdiction, and its judgment has no force either in the state in which it is rendered or in any other state. *Pennoyer v. Neff* is also approved and followed in *Bank v. Henry*, 156 Ind. 1, 58 N. E. 1057.

In *Hill v. Henry*, 66 N. J. E. 150, 57 Atl. 554, the Court of Chancery of New Jersey said: "The following propositions have been established by the supreme court: First. That a personal judgment is without validity, if it be rendered by a state court in an action upon a money demand against a nonresident, proceeded against by publication, but not personally served with process within the state, and not appearing. Second. That no validity is imparted to such a judgment by the fact that the defendant has, at the time the action is commenced, property within the state, upon which a levy can be made under the judgment. (*Pennoyer v. Neff*, 95 U. S. 714, 24 L. Ed. 565.)"

The Supreme Court of Minnesota, in *Cabanne v. Graf*, 87 Minn. 510, 92 N. W. 461, 59 L. R. A. 735, 94 Am. St. Rep. 722, said: "Prior to the decision in the case of *Pennoyer v. Neff*, 95 U. S. 714, 24 L. Ed. 565, it was the law of this state, and in some other jurisdictions, that, if a nonresident defendant had property in this state, its court had jurisdiction, without

seizing it, to proceed by publication of the summons, and render a judgment *in personam*, valid within the state to the extent of any property of the defendant therein. (*Stone v. Myers*, 9 Minn. 303, (Gil. 287) 86 Am. Dec. 104; *Cleland v. Tavernier*, 11 Minn. 194, (Gil. 126.) Such, however, is not now the law, for the statute authorizing such a proceeding would not be due process of law. (*Kenney v. Goergen*, 36 Minn. 190, 31 N. W. 210; *Lydiard v. Chute*, 45 Minn. 277, 47 N. W. 967; *Plummer v. Hatton*, 51 Minn. 181, 53 N. W. 460.)

"*Pennoyer v. Neff*, 24 L. Ed. 565, is the leading authority in support of the now well-settled proposition that, except as to proceedings affecting the personal status of the plaintiff, or *in rem*, or as to actions to enforce liens, or to quiet title, or to recover possession of property, or for the partition thereof, or to set aside fraudulent transfers thereof, or to obtain judgment enforceable against property seized by attachment or other process, no state can authorize its courts to compel a citizen of another state remaining therein to come before them and submit to their decision a mere claim upon him for a money demand, no matter what the prescribed mode of service of process against him may be. An attempt to do so is not due process of law."

3. As to the third question. It is contended that it is competent for the state by statute to provide for valid service by publication in actions *in personam*. If this state has done so, the question of the constitutionality of such a statute might be involved. If it has not done so, that question is, of course, eliminated from consideration.

Section 637 of the Code of Civil Procedure provides: "When the person on whom the service of a summons is to be made, resides out of the state, or has departed from the state, or cannot, after due diligence, be found within the state, or conceals himself to avoid the service of the summons; or when the defendant is a foreign corporation, having no managing or business agent, cashier, secretary or other officer within the state, and an affidavit stating any of these facts is filed with the clerk of the court in which the action is brought, and such affidavit also

states that a cause of action exists against the defendant in respect to whom the service of the summons is to be made, and that he or it is a necessary or proper party to the action, the clerk of the court in which the action is commenced shall cause the service of the summons to be made by publication thereof."

Counsel for respondents cites *Perkins v. Wakeham et al.*, 86 Cal. 580, 25 Pac. 51, 21 Am. St. Rep. 67, as sustaining the view that service of summons by publication in actions strictly *in personam* may be had under a statute similar to our Section 637, above, and there is an expression to be found in the opinion of the court in that case bearing out that idea, and that case is apparently cited with approval in *Seculovich v. Morton*, 101 Cal. 67, 36 Pac. 387, 40 Am. St. Rep. 106, in an action to have a trust declared and enforced, and in which we are unable to see any applicability of the doctrine announced in *Perkins v. Wakeham*. In *Loaiza v. Superior Court*, 85 Cal. 11, 24 Pac. 707, 20 Am. St. Rep. 197, the same court had at great length reviewed the cases, and put itself in harmony with the weight of authority as we have outlined it, and distinguished between the classes of cases where service of summons may be made by publication and where it may not be, and in the latter class included actions strictly *in personam*; and this case was not alluded to or overruled in either of the cases cited above.

An examination of the opinion in *Perkins v. Wakeham*, above, discloses that the decision of the court is made upon the theory that an action to quiet title, which was the form of action in that case, is one affecting the title to real estate. Whether that doctrine would be approved by this court is not decided; suffice it to say that the present action, being to enforce the specific performance of a contract, is not one which affects title to real estate, for, if it did, it could only be tried in the county where the real estate is situated, whereas the authorities are practically unanimous in holding that such an action may be tried where jurisdiction of the defendant is obtained, without reference to the location of the real estate.



In *Roller v. Holly*, 176 U. S. 398, 20 Sup. Ct. 410, 44 L. Ed. 520, a statute of Texas, as broad in its provisions as our Section 637, above, was under consideration, and, respecting it, the court said: "It is true there is no statute of Texas specially authorizing a suit against a nonresident to enforce an equitable lien for purchase money, but Article 1230 of the Code of Texas, hereinafter cited, contains a general provision for the institution of suits against absent and nonresident defendants, and lays down a method of procedure applicable to all such cases. Obviously this Article has no application to suits *in personam*, as was held by the Supreme Court of Texas in *York v. State*, 73 Tex. 651, 11 S. W. 869; *Kimmarle v. Houston & Texas Central Railway*, 76 Tex. 686, 12 S. W. 698; *Maddox v. Craig*, 80 Tex. 600, 16 S. W. 328; and by this court in *Pennoyer v. Neff*, 95 U. S. 714, 723, 24 L. Ed. 565. The Article must then be restricted to actions *in rem*; but to what class of actions, since none is mentioned specially in this Article? We are bound to give it some effect. We cannot treat it as wholly nugatory, and, as it is impossible to say that it contemplates a procedure in one class of cases and not in another, we think the only reasonable construction is to hold that it applies to all cases where, under recognized principles of law, suits may be instituted against nonresident defendants." We prefer to adopt this view as more in consonance with reason and the general practice which has heretofore prevailed throughout this country.

The other questions involved in this case need not be considered.

The court had no jurisdiction of the defendant. The judgment rendered is nugatory and is reversed and the cause remanded.

*Reversed and remanded.*

MR. CHIEF JUSTICE BRANTLY and MR. JUSTICE MILBURN  
concur.

Rehearing denied February 7, 1905.

THE ORIENT INSURANCE COMPANY OF HART-  
FORD, CONN., RESPONDENT, v. NORTHERN  
PACIFIC RAILWAY COMPANY,  
APPELLANT.

(No. 1,974.)

(Submitted November 18, 1904. Decided January 6, 1905.)

*Act of God — Pleading — Contributory Negligence—Locomotives Setting Fire—Evidence of Spark-Throwing—Corporations—Warehouse Company—Stockholders.*

Act of God—Defense—Must be Plead.

1. The act of God is a defense which must be pleaded, to be available.

Contributory Negligence—Defense—Must be Plead.

2. Contributory negligence is a defense which, in order to be relied on, must be pleaded by defendant.

Pleadings—Contributory Negligence—Complaint.

3. The existence of contributory negligence need not be negatived in the complaint, unless it appears from other allegations therein that the proximate cause of the injury was the act of the plaintiff.

Pleadings—Contributory Negligence—Surplusage.

4. An allegation in the complaint in an action against a railroad company to recover damages for the burning of property by sparks from a locomotive, that the property was destroyed by negligence of defendant, and without fault of the owners or plaintiff, denied generally in the answer, is not sufficient to raise the issue of contributory negligence of plaintiff. This allegation is surplusage and need not be proved.

Railroads—Locomotives—Sparks—Evidence.

5. In an action for the burning of property by sparks from a locomotive, a witness may testify how the quantity of sparks thrown by the engine at the time compared with that thrown by other engines along the road.

Corporations—Warehouses.

6. Under Subdivision 25 of Section 393 of the Civil Code, a corporation may be organized for the purpose of storing goods in a warehouse for shipment.

Railroads—Warehouses—Liability for Destruction—Evidence.

7. A railroad company is not relieved of liability for the burning of goods in a warehouse because the owners of the property were stockholders in the warehouse company—a corporation—though in its lease of the ground from the railroad company "it assumed all risk of loss to the building and contents occasioned by fire and sparks from locomotives," etc., and exclusion of evidence tending to show these matters was not error.

*Appeal from District Court, Custer County; C. H. Loud, Judge.*

ACTION by the Orient Insurance Company of Hartford, Connecticut, against the Northern Pacific Railway Company, to recover insurance paid to owners of wool stored in a warehouse ignited by sparks from defendant's engines and burned. Judgment for plaintiff. Defendant appealed. Affirmed.

*Mr. Wm. Wallace, Jr., and Mr. Chas. Donnelly, for Appellant.*

The doctrine of imputed contributory negligence has been directly applied where the relations between the parties is that of bailor and bailee; and it has been expressly held that the contributing negligence of the bailee, in reference to property entrusted to his care, will be charged to his bailor and will defeat a recovery from a third person, by whose negligence the property has been destroyed. (*Illinois Central Ry. Co. v. Sims*, 27 So. 527; *Welby v. Indianapolis & N. Ry. Co.*, 4 N. E. 410; *Texas Ry. Co. v. Tankersly*, 63 Tex. 57; *Luke v. City*, 84 Pa. St. 230.)

The mere fact that a charter had issued to a warehouse company would not make said company a *de facto* corporation, if there was no law under which the corporation might exist. "To be a corporation *de facto* it must be possible to be a corporation *de jure*." (*Everson v. Ellingsworth*, 67 Wis. 634; 1 Thompson on Corporations, Sec. 505; *Eaton v. Walker*, 1 Douglass, (Mich.) 351.) Parties carrying on business in a corporate name without being in fact a corporation either *de jure* or *de facto*, are liable as partners. (*Eaton v. Walker, supra*; 1 Thompson on Corporations, Sec. 506.) The provision in the lease exempting defendant from liability is valid. (*Hartford Ins. Co. v. Ry. Co.*, 175 U. S. 99.)

The construction, maintenance and operation of wool warehouses would not be called either a commercial or a mercantile or an industrial business, within the ordinary or legal definitions of these terms. The term "commercial," as its meaning is gathered from the numerous definitions of the term "commerce," has direct reference to traffic, intercourse or an inter-

change of commodities. It would not be applied to a business of simply furnishing depositories for the commodities so interchanged. (*Gibbon v. Ogden*, 1 Wheaton, 189; 6 Am. and Eng. Ency. of Law, 47, and cases cited; *In re New York Water Co.*, 98 Fed. 713; *In re Cameron, etc. Insurance Co.*, 96 Fed. 757.)

Mr. Sidney Sanner, and Messrs. Van Ness & Redman, for Respondent.

Contributory negligence upon the part of the warehouse company, if any there was, may not be imputed to Hunter & Anderson, nor to plaintiff as their equitable or legal assignee. (*The Bernina*, 12 Prob. Div. 58; see note to *Borough of Carlisle v. Brisbane*, 57 Am. Rep. p. 494, *et seq.*; *Bennett v. N. J. R. Co.*, 36 N. J. L. (7 Vroom.) 225; *N. Y. etc. R. Co. v. Steinbrenner*, 47 N. J. L. (18 Vroom.) 161; *Chapman v. New Haven R. Co.*, 19 N. Y. 341; *Dyer v. Erie R. Co.*, 71 N. Y. 228; *Transfer Co. v. Kelly*, 36 Ohio St. 86; *Wabash, etc. R. Co. v. Shacklett*, 105 Ill. 364; *Danville, etc. Turnpike Co. v. Stewart*, 2 Met. (Ky.) 119; *Louisville, etc. R. Co. v. Case*, 9 Bush. (Ky.) 728; *Cuddy v. Horn*, 46 Mich. 596; *Tompkins v. Clay St. R. Co.*, 66 Cal. 163.)

That negligence in the conduct of another will not be imputed to a party if he neither authorized such conduct, nor participated therein, nor had the right or power of control, is held in the following cases: *Kellar v. Shippel*, 45 Ill. App. 377; *Koplitz v. St. Paul*, 90 N. W. Rep. 794; *Hajsek v. Ry. Co.*, 94 *Id.* 609; *Pyle v. Clark*, 75 Fed. 644. The law undoubtedly is, as charged by the court, that "in order that a party may be relieved from liability for his own negligence by reason of the contributory negligence of the injured party, the negligence of the injured party must contribute to such injury as a proximate cause, and not as a remote cause or mere condition." (*T. & P. Ry. v. Levine*, (Texas) 29 S. W. 514; *G. C. & S. F. Ry. v. McLean*, (Texas) 12 S. W. 843; *Clay Co. v. B. & O.*, 67 N. E. 704; *Ins. Co. v. Ry. Co.*, 12 So. 159; *Ry. Co. v. Ins. Co.*, 35 So. 304; *A. T. & S. F. Ry. v. Geiser*, 75 Pac. 71; *Ry. Co. v.*

*Wilson*, 35 So. 561; *Turnbull v. Ry. Co.*, 120 Fed. 783; *So. Ry. v. Webb*, 59 L. R. A. 109; *C. H. & D. Ry. v. Kassen*, 16 L. R. A. 674; *Johnson v. St. Joseph*, 71 S. W. 106; *Duval v. At. Coast Line*, 46 N. E. 750; *Shearer v. Buckley*, 72 Pac. 76; *Ry. Co. v. Garteiser*, (Texas) 29 S. W. 939; *Ry. Co. v. Swinney*, (Texas) 78 S. W. 547; *Markham v. Nav. Co.*, (Texas) 11 S. W. 131; *Garteisen v. Ry. Co.*, (Texas) 21 S. W. 631.)

"Commerce is traffic, but it is much more. It embraces also transportation by land and water, and all the means and appliances necessarily employed in carrying it on." (*Chicago, etc. R. Co. v. Fuller*, 17 Wall. 568.) By the term "commerce" is meant not traffic only, but every species of commercial intercourse, every communication by land or water, foreign and domestic, external and internal. (*State v. Delaware, etc. R. Co.*, 30 N. J. L. 478.) "Commerce" is a term of the largest import. It comprehends intercourse for the purposes of trade in any and all its forms. (*Welton v. Missouri*, 91 U. S. 280; *Campbell v. Chicago, etc. R. Co.*, 86 Iowa, 589; *Council Bluffs v. Kansas City, etc. R. Co.*, 45 Iowa, 338.)

MR. COMMISSIONER CLAYBERG prepared the following opinion for the court:

Appeal by the Northern Pacific Railway Company from a judgment and order overruling its motion for a new trial.

It appears from the complaint that on June 30, 1900, the warehouse owned by the Custer County Wool Warehouse Company, and situated upon the right of way of the railway company, was ignited by sparks from one of defendant's engines and burned; that there was stored therein certain wool belonging to the firm of Hunter & Anderson, which was consumed with the building; and that this firm had their wool insured by the plaintiff company, which paid them the sum of \$3,355.57, the value thereof. The complaint further alleges "that the fire by which said above referred to wool was destroyed as aforesaid was caused by sparks thrown out by a locomotive at said time and place owned, used and operated by the defendant herein,

which said sparks escaped from said locomotive, and fell in and upon said warehouse and its contents, and ignited the same, by reason of the defective construction and impaired condition of said locomotive, and the careless and negligent manner in which the same was then and there used and operated by defendant, and wholly by reason thereof, and without any fault on the part of said firm of Hunter & Anderson, or any member thereof, or plaintiff." Hunter & Anderson, prior to the commencement of the suit, assigned, transferred and set over to plaintiff all claim, demand and right of action growing out of the destruction of the wool, due to the alleged negligence of defendant.

The railway company, after certain admissions and denials of the complaint, alleged as a separate and affirmative defense that the wool warehouse company was a joint-stock association and a joint partnership, and that Hunter & Anderson were joint owners and partners therein; that said "joint-stock association" leased the ground upon which the warehouse was built from the railway company, and, by the terms of such lease, assumed all risk of loss to the building and contents occasioned by fire and sparks from locomotives, engines, etc.

For a second separate and affirmative defense, defendant alleges that the warehouse was carelessly and improperly built of highly inflammable material, which was well known to Hunter & Anderson when they placed their wool therein; that the plaintiff also well knew these facts when it insured said wool, and, in consideration of a higher premium, insured against this additional risk.

Plaintiff denied all the allegations of new matter by replication. The case was tried before a jury, and resulted in a verdict for plaintiff in the sum of \$3,355.57, and judgment was entered thereon. Defendant made a motion for a new trial, which was overruled.

The only errors assigned in the brief of appellant are as follows: (1) The denial of defendant's motion for a new trial. (2) The overruling of defendant's objections to a certain question asked by plaintiff's counsel of witness Buckner. (3) Giv-

ing of instruction No. 26. (4 and 5) The refusal of defendant's offered instructions 35 and 36. (6) The refusal to allow defendant to show that Hunter & Anderson owned ten shares of stock in the warehouse company.

1. It is first urged by appellant in the argument that the destruction of the wool was proximately caused by an unprecedented wind blowing on the day of the fire, and would not have occurred, had there not been such wind. Appellant therefore claims that the injury was caused by the act of God, and not by its alleged negligence. We cannot consider this proposition, because the act of God is a defense to the action, and must be pleaded as such. We look in vain to appellant's answer for any allegations on which this defense may be based.

2. The next proposition argued is that of imputed contributory negligence on the part of Hunter & Anderson, plaintiff's assignees.

It is claimed that the warehouse company was bailee of Hunter & Anderson, and was guilty of contributory negligence, and that such contributory negligence is imputable to Hunter & Anderson, which would prevent a recovery by them, and therefore by plaintiff. This point is based upon the giving by the court of paragraph 26 of the charge, and the refusal of the court to give charges 35 and 36 requested by defendant. By refusing to give the charges requested, and by giving paragraph 26, it is claimed that the court practically withdrew from the jury the consideration of contributory negligence. This was right, on the ground that contributory negligence was not put in issue by the pleadings; and it may have been equally right on other grounds, appearing to the satisfaction of the court. Although the court below may not have based its action on the ground of want of an issue raised by the pleadings, yet, if its action was correct, even though based upon other grounds, it must be affirmed.

Under the decisions of this court, contributory negligence on the part of plaintiff is a defense which, in order to be relied on, must be pleaded by defendant, in cases of this character. (*Ball*

v. *Gussenhoven*, 29 Mont. 321, 74 Pac. 871; *Cummings v. Helena & Livingston S. & R. Co.*, 26 Mont. 434, 68 Pac. 852, and cases cited.) The existence of contributory negligence need not be negatived in the complaint unless it appears from other allegations therein that the proximate cause of the injury was the act of the plaintiff. Upon the other allegations of this complaint, it is very apparent that the proximate cause of the injury in this case, for which suit was brought, was not the act of plaintiff, or of any of its predecessors or its assignees, but that of defendant. We find no allegations of such defense in the answer. True, the allegation is found in the complaint that the wool was destroyed by negligence of defendant, "and wholly by reason thereof, and without any fault on the part of said firm of Hunter & Anderson, or of any member thereof, or plaintiff." This allegation was denied generally in the answer. This is not sufficient to raise the issue of the contributory negligence of the plaintiff or its assignors. Plaintiff was not required, as above stated, to allege want of contributory negligence, and therefore its allegations above quoted are mere surplusage, and need not be proved. Defendant cannot be heard to assert that it is excused from pleading the defense of contributory negligence because of this allegation in the complaint.

3. The next alleged error argued was the overruling of defendant's objection to the following question asked of witness Buckner: "Q. With regard to the throwing of sparks by engines of the Northern Pacific Railway when pulling trains of that company over this road, how did the quantity and size of sparks thrown out of the engine on the night of the fire, and as to which you have testified with regard to quantity and size—How did that throwing of sparks compare with other engines throwing sparks along the line of this road?" Counsel for defendant interposed the following objection: "Objected to on the ground that the witness was not entitled to give an opinion by way of comparison between different engines; and, second, because inadmissible without a showing that the conditions as to the engines compared were practically the same." To this



question the witness answered: "As far as the size of them was concerned, I never noticed any particular size of them; but, in quantity, this engine threw more than I ever saw along at that time, or had seen."

The evident purpose of this testimony was to show negligence on the part of defendant, either in the equipment of the locomotive, or in its careless handling. The question did not call for expert testimony, and we think the evidence was properly received. As is well said by the Supreme Court of Wisconsin in the case of *Brusberg v. Milwaukee, etc. Railway Co.*, 55 Wis. 106, 12 N. W. 416: "A witness for plaintiff was allowed, against the defendant's objection, to testify how the fire thrown from the locomotive that morning, at the time it passed the plaintiff's barn, compared with the fire coming from the engines on that road before that time. We think this evidence was competent to show that it was at the time emitting an unusual quantity of fire. A similar objection was made to the same kind of testimony given by other witnesses of plaintiff. We see no reason for excluding this kind of evidence, and think the objections were all properly overruled." As further sustaining this proposition, the following cases might be consulted: *Johnson v. Chicago, etc. R. Co.*, 31 Minn. 57, 16 N. W. 488; *Chicago, etc. R. Co. v. McCahill*, 56 Ill. 28; *Wabash R. Co. v. Smith*, 42 Ill. App. 527; *Ruppel v. Manhattan R. Co.*, 13 Daly, 11; *Grand Trunk R. R. Co. v. Richardson*, 91 U. S. 454, 23 L. Ed. 356.

4. The next question presented for consideration is that the Custer County Wool Warehouse Company is not a corporation, but an association of individuals or a partnership. Appellants claim that, this being true, each stockholder or partner was bound by the provisions of the lease from the Northern Pacific Railway Company to the association or partnership, by which they waived all damages which might arise from a destruction of the warehouse by any act of the railway company.

The ground upon which the contention that the warehouse company was not a corporation is based is that there is no stat-

ute in Montana providing for the formation of corporations for the purpose of doing the business in which the wool warehouse company was engaged, and that the purposes mentioned in the statute for which corporations may be formed are exclusive.

We find that Subdivision 25 of Section 393 of the Civil Code provides that a corporation may be formed for "the transaction of any mercantile, commercial, industrial, manufacturing, mining, mechanical or chemical business." We think it is clear from the certificate of incorporation of the Custer County Wool Warehouse Company that its organization may be maintained under the purposes mentioned in the above-quoted subdivision. The business of carrying on a warehouse is closely connected with, and is a part of, the general commercial business of the country. The act of a warehouse company in storing goods for shipment is a necessary part of the transportation of the wool from the place of its production to the markets. Warehouses are therefore provided for this purpose, and the business of a warehouseman is just as much a link in wool commerce as its transportation to market by the railroad company. The business of warehousing grain has been recognized by the Supreme Court of the United States to be a part of the commerce of the country. (*Munn v. Illinois*, 94 U. S. 113, 24 L. Ed. 77.)

5. Further error is alleged upon the refusal of the court to allow defendant to show that Hunter & Anderson were the owners of ten shares of stock in the Custer County Wool Warehouse Company. We are of the opinion that the court did not err in excluding this evidence. If the Custer County Wool Warehouse Company was a corporation, it made no difference whether Hunter & Anderson were stockholders in it or not.

We are therefore of the opinion that there is no error disclosed by the record, and the case should be affirmed.

PER CURIAM.—For the reasons stated in the foregoing opinion, the judgment and order are affirmed.

STATE EX REL. BORDEAUX, RELATOR, v. DISTRICT  
COURT OF THE SECOND JUDICIAL DIS-  
TRICT ET AL., RESPONDENTS.

(No. 2,117.)

(Submitted November 4, 1904. Decided January 6, 1905.)

*Supervisory Control—Contempt—Divorce—Order to Pay Ali-  
mony—Modification—Appeal.*

**Contempt—Alimony—Modification of Order—Supervisory Control.**

1. One ordered to pay alimony, to protect himself from contempt proceedings for noncompliance therewith because of stress of circumstances, should apply for revocation or modification of the order, and, upon failure of such application to the district court, the writ of supervisory control will not lie to relieve him from punishment for noncompliance with such order.

**Divorce—Alimony—Revocation or Modification of Order.**

2. Until a suit for divorce is finally determined, or until the order granting alimony therein is revoked or modified by the court which made it, a wife is entitled to alimony.

**Divorce—Alimony—Appeal—Contempt—Jurisdiction.**

3. An action for divorce is still in the district court, notwithstanding pendency of an appeal, so as to authorize that court, by contempt proceedings, to compel obedience to its order for payment of alimony.

ORIGINAL application by the state, on the relation of John R. Bordeaux, against the district court of the Second Judicial District, and Hon. William Clancy, a judge thereof, to the Supreme Court under its supervisory power, for an order setting aside an order of the district court committing the relator to prison in certain contempt proceedings for failure to comply with order granting alimony.

*Mr. B. S. Thresher, Mr. C. F. Kelley, and Mr. Peter Breen,*  
for Relator.

*Mr. John J. McHatton, and Mr. John G. Brown,* for Re-  
spondents.

MR. JUSTICE MILBURN delivered the opinion for the  
court.

This is a petition of relator asking for a writ of supervisory control to annul and set aside an order of the district court committing said Bordeaux to prison in certain contempt proceedings.

It appears from the record that before the granting of a decree in divorce in favor of the plaintiff against the defendant in the case of *Bordeaux v. Bordeaux*, 30 Mont. 36, 75 Pac. 524, now before this court for final determination upon appeal after rehearing, the district court made an order directing the plaintiff (relator herein) to pay to his wife, the defendant, the sum of \$100 per month alimony, and that this order has never been revoked or modified. In the contempt proceeding it appears that some time after the decree, and after appeal therefrom to this court, the relator failed to pay to his wife the alimony fixed by the court. Upon being cited to show cause why he should not be punished for contempt, he pleaded that he had been enjoined by the court from disposing of any of his property, and that his income was not sufficient to enable him to make the payment, and, further, that the court had no jurisdiction to make any order in the premises, because the case was not then in the district court, but on appeal. The court found his reasons insufficient, fined him \$20 for contempt, and ordered him to pay the alimony then due, and to stand committed until the order of the court was complied with and the fine satisfied.

The action of the court was correct. If he could not, by stress of circumstances, comply with the order of the court, it was his duty, for his own protection, to go into court, relate the circumstances, and pray for a revocation or modification of the order directing him to pay alimony. It appears that his property is worth over \$60,000, and his income more than \$400 per month. A wife is entitled to the alimony until the case is finally determined, or until the order is revoked or modified by the court which made it. As has been heretofore said by this court, the supreme court has jurisdiction as soon as the notice of appeal has been regularly served and filed, and a sufficient

undertaking properly filed with the clerk of the court below, but the *case* is in the district court. The determination of the appeal is for the supreme court. The district court has authority to compel obedience to its orders granting alimony. The supreme court certainly would not have any authority to enforce the order of the district court in the premises. (*Gran- nis v. Superior Court of the City and County of San Francisco*, 143 Cal. 630, 77 Pac. 647.)

The petition is denied, and the proceedings are dismissed.

MR. JUSTICE HOLLOWAY concurs.

MR. CHIEF JUSTICE BRANTLY, not having heard the argu- ment, takes no part in the foregoing decision.

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WATSON ET AL., RESPONDENTS, v. COLUSA-PARROT  
MINING & SMELTING COMPANY,  
APPELLANT.

(No. 1,981.)

(Submitted November 10, 1904. Decided January 10, 1905.)

*Torts—Nuisances—Continuance by Purchaser of Premises—  
Notice to Abate—Pollution of Streams—Apportionment of  
Damages—Injury to Crops—Injury to Land—Evidence—  
Opinion Testimony—Value—Witnesses—Cross-Examination  
—Conflicting Instructions.*

**Mining and Reduction—Nuisances—Pollution of Streams—Liability.**

1. Where a nuisance arises from the individual acts of different mining and reduction companies, which have discharged deleterious and poisonous matter into the waters of a creek, and the injury is not caused by the joint acts of defendant and any other corporation, each company is liable to the person injured for the damage caused by its own wrongful acts, and none other, and the full damage must be apportioned among all the wrongdoers.

**Mining and Reduction—Pollution of Streams—Damages—Difficulty of Ascertaining.**

2. The mere fact that it is difficult to determine what part of the damage was occasioned by the acts of the defendant mining and smelting company, in an action for damages for injury to lands by the pollution of a stream, it appearing that other like companies contributed to the injury, is no objection to the relief asked.

**Torts—Evidence—Conjecture—Jury.**

3. Competent evidence must be produced of all facts, necessary to a recovery of damages in actions upon torts, upon which the jury may base a reasonably reliable conclusion, and nothing must be left to mere conjecture.

**Pollution of Streams—Measure of Damages.**

4. The measure of damages for permanent injury to land, resulting from the poisoning of the waters of a stream, whereby its value for agricultural purposes is absolutely destroyed, is the difference between the value of the land prior to the injury and its value after the injury.

**Pollution of Streams—Complaint—Evidence—Waiver.**

5. By failing to introduce evidence in support of an allegation that damages had been caused by pollution of water so as to render it unfit for a particular use, recovery is waived thereon.

**Pollution of Streams—Damages Recoverable—For What Period.**

6. Where several years elapse before a total and permanent injury to lands for agricultural purposes by the pollution of a stream is completed, the owners are entitled to recover damages for the yearly injury to their crops caused by the continuing nuisance, until the land was so totally and permanently injured; but no damages are recoverable for damages to the crops after such permanent injury.

**Pollution of Streams—Injury to Lands—Pleadings—Proof.**

7. In order to permit a recovery for injury to crops and for permanent injury to the land on which the crops were raised, it should be distinctly and unequivocally alleged and proven on what date the permanent injury to the land took place, how much of the land was permanently injured, and the annual injury to crops prior to that date.

**Pollution of Streams—Injury to Lands—When Suit May be Brought.**

8. In order to recover damages, resulting from a nuisance, for total and permanent injury to land, caused by pollution of a stream, such injury must have been completed before suit can be brought.

**Pollution of Streams—Damages Recoverable—By Whom.**

9. Owners of agricultural lands cannot recover for injuries arising from a destruction of crops, by reason of pollution of the waters of a stream, prior to the date when they acquired title to the lands, unless they were then in possession or entitled to possession thereof.

**Continuing Nuisances—Predecessors in Interest—Who Liable for Damages.**

10. A person continuing a nuisance is not liable for damages caused by the operation of the nuisance by his predecessors in interest, but redress must be had in an action against such predecessors for damages prior to the date when he went into possession.

**Pollution of Streams—Non-Expert Witness—Opinion Evidence.**

11. In an action for damages caused by the pollution of a stream, testimony of non-expert witnesses as to the effect of the water on land and crops is not objectionable as opinion evidence.

**Non-Expert Witnesses—Opinion Evidence.**

12. When a non-expert witness has shown himself qualified to express an opinion upon the matter in issue, his testimony is not objectionable.

**Opinion Evidence—Competency of Witness.**

13. Before opinion evidence on the question of value is admissible, the court must pass upon the competency of the witness.

**Pollution of Streams—Witnesses—Cross-Examination.**

14. In an action for damages caused by the pollution of a stream, a ques-

tion asked a witness, who produced a sample of water from the stream, as to whether he did not know that the sewerage of a city was dumped into the stream at the place where he procured the sample, should have been allowed on cross-examination.

**Evidence—Written Contract—Contents.**

15. Before evidence of the contents of a written contract can be admitted, the absence of the original agreement must be accounted for.

**Continuing Nuisances—Abatement—Notice.**

16. Under Civil Code, Section 4554, it is not necessary to give notice to one who continues a nuisance, to abate it, before bringing suit for damages arising therefrom.

**Results of One's Acts—Knowledge—Presumptions.**

17. Every man is charged with the knowledge of the results of his own acts.

*Appeal from District Court, Deer Lodge County; Welling Napton, Judge.*

ACTION by J. W. Watson et al. against the Colusa-Parrot Mining & Smelting Company for damages arising out of injury to lands and crops by reason of the discharge of poisonous and deleterious matter into a stream. From a judgment and an order denying a new trial, defendant appeals. Reversed.

*Mr. Jesse B. Roote, Mr. W. A. Clark, Jr., Mr. W. M. Bickford, and Mr. Geo. F. Shelton, for Appellant.*

*Mr. S. C. Herren, and Mr. I. G. Denny, for Respondents.*

MR. COMMISSIONER CLAYBERG prepared the opinion for the court.

Appeal by defendant from a judgment and an order overruling its motion for a new trial.

Plaintiffs claim to be the owners of certain agricultural lands situated on Deer Lodge river below defendant's concentrating, smelting and reduction plant, and allege that defendant has polluted the water of Silver Bow creek, a tributary of Deer Lodge river, by the operation of its plant, to such an extent as to render such waters unfit for irrigation or domestic use; that the refuse and deleterious substances deposited in the stream by defendant have accumulated on their land and injured their crops, and have rendered the soil unproductive and sterile, per-

manently injuring the same. They pray judgment for \$5,000 for deprivation of the use of the waters for domestic purposes for five years, for \$5,000 for injury to and destruction of their crops during the same time, for \$10,000 for permanent injury done their land by defendant, and for an injunction against the further pollution, and for costs and general relief.

Defendant, by answer, denies most of the allegations in the complaint; admits that defendant for a period of over five years has operated a concentrating, smelting and reduction plant at a point upon one of the tributaries of the stream above plaintiff's land; admits that since the year 1897 defendant has so operated said plant, and that the waters flowing therefrom "have been impregnated with and have carried away tailings and other substances, and refuse matter produced in and resulting from such smelting operations, and that such tailings and other refuse matter have been carried by the said waters and deposited along the course of said stream and of Deer Lodge river, into which said Silver Bow creek flows, and upon the banks thereof wherever said waters have been accustomed to flow"; and alleges that it is lawful for it so to do. As an affirmative defense, defendant sets forth the prescriptive right to commit the acts above stated. It then pleads Section 29, Code of Civil Procedure of 1887, Sections 484 and 524, Code of Civil Procedure of Montana, Subdivision 1, Section 513, Code of Civil Procedure, as amended by House Bill 75, Session Laws 1901, page 157, as defense by way of the statutes of limitation. The plaintiffs, by replication, deny all the affirmative allegations of new matter contained in the answer.

1. Under the facts disclosed by the record it is apparent that the nuisance complained of as causing the injury for which damages are sought arose from individual acts of different mining and reduction companies operating mines and plants in the city of Butte, whereby they have discharged deleterious and poisonous matter into the waters of Silver Bow creek, a tributary of Deer Lodge river; that the nuisance was merely incidental to and the result of such acts; and that the injury was



not caused by the joint acts of defendant and any other corporation or person.

Under the following authorities the defendant was liable to plaintiffs for whatever damage it caused by its own wrongful acts, and none other: *Chipman v. Palmer*, 77 N. Y. 51, 33 Am Rep. 566; *Harley v. Merrill Brick Co.*, 83 Iowa, 73, 48 N. W. 1000; *Sellick v. Hall*, 47 Conn. 260; *Loughran v. City of Des Moines*, 72 Iowa, 382, 34 N. W. 172; *Martinowsky v. City of Hannibal*, 35 Mo. App. 70; *Little Schuylkill Nav. Co. v. Richards' Adm'r*, 57 Pa. 142, 98 Am. Dec. 209; *Miller v. Highland Ditch Co.*, 87 Cal. 430, 25 Pac. 550, 22 Am. St. Rep. 254; *Brown v. McAllister*, 39 Cal. 573; *Westgate v. Carr*, 43 Ill. 450; *Partenheimer v. Van Order*, 20 Barb. 479; *Lull v. Fox & Wis. Imp. Co.*, 19 Wis. 100; *Brennan v. Corsicana Cotton-Oil Co.*, (Tex. Civ. App.) 44 S. W. 588; *Van Steenburgh v. Tobias*, 17 Wend. 562, 31 Am. Dec. 310; *Auchmuty v. Ham*, 1 Denio, 495; *Keyes v. L. Y. G. W. & W. Co.*, 53 Cal. 724; *Sloggy v. Dilworth*, 38 Minn. 179, 36 N. W. 451, 8 Am. St. Rep. 656.

Defendant could not be held to respond in damages for the entire injury occasioned to plaintiffs by the nuisance complained of, because confessedly it only contributed to this injury. The full damage, therefore, must be apportioned among all the wrongdoers. The mere fact that it is difficult to determine what part of the damage was occasioned by acts of the defendant is no objection to the relief asked. (*Chipman v. Palmer*, 77 N. Y. 51, 33 Am. Rep. 566; *Harley v. Merrill Brick Co.*, 83 Iowa, 73, 48 N. W. 1000; *Sellick v. Hall*, 47 Conn. 260; *Lull v. Improvement Co.*, 19 Wis. 101.) The Supreme Court of Connecticut, in *Sellick v. Hall*, *supra*, uses the following very pertinent language: "It may be very difficult for a jury to determine just how much damage the defendant is liable for and how much should be left for the city to answer for; but this is no more difficult of ascertainment than many questions which juries are called upon to decide. They must use their best judgment, and make their result, if not an abso-

lutely accurate one, an approximation to accuracy. And this is the best that human tribunals can do in many cases. If the plaintiff is entitled to damages and the defendant liable for them, the one is not to be denied all damages, nor the other loaded with damages to which he is not legally liable, simply because the exact ascertainment of the proper amount is a matter of practical difficulty."

Like all other case for the recovery of damages in actions upon torts, a jury must be trusted to arrive at a fair estimate of the damages after a full consideration of all the evidence which may be introduced upon the subject. However, competent evidence must be produced of all facts necessary to a recovery, upon which the jury can base a reasonably reliable conclusion; nothing can be left to mere conjecture.

2. In this case the injury to plaintiffs' land is alleged to be permanent; that its value is absolutely destroyed for agricultural purposes by the deposit of refuse and poisonous matter on the surface. Plaintiffs sought to recover as their damages for this injury the difference between the value of the land prior to the injury and its value after the injury. The court coincided with this view, and so instructed the jury, and we have no doubt but that this rule of damages for the permanent injury to the land was correct. (*Sweeny v. Montana Central Ry.*, 19 Mont. 163, 47 Pac. 791; *Jeffersonville, etc. R. R. Co. v. Esterle*, 13 Bush. 667; *Kemper v. City of Louisville*, 14 Bush. 87; *Babb v. Curators University of Missouri*, 40 Mo. App. 173.)

Plaintiffs also allege damage caused by pollution of the water to such an extent as to render it unfit for domestic use and watering stock, but introduce no evidence of such damage. Plaintiffs thereby waived recovery upon such allegation.

They also claim damage for injury to their crops for various years; they introduced proof thereon, and the court instructed the jury with reference thereto. The verdict was a general one for \$3,000 damages, and rendered by the jury under instructions of the court allowing a recovery for permanent injury

to the land and also for injury to the crops. This verdict may, and doubtless does, include damages for both the above causes.

Generally, the recovery of damages for a total and permanent injury to land includes all injuries—past, present and future. It practically amounts to an allowance to take the land upon which the nuisance has been committed for those purposes upon payment of a reasonable compensation therefor, and the amount fixed as damages by the jury and court will be treated as such reasonable compensation. But in this case the permanent and total injury to the land for agricultural purposes did not immediately result from the nuisance itself, but several years elapsed before such injury was completed. Therefore, until the land was thus totally and permanently injured, plaintiffs would be entitled to recover damages for the yearly injury to their crops caused by the continuing nuisance.

When the land was totally and permanently injured for agricultural purposes, under the above authorities, no damages could be allowed for injury to the crops ensuing thereafter. Plaintiff thereby becomes compensated for everything which he could produce by the use of the land. In order, however, to allow plaintiffs to recover for injury to the crops and the permanent injury to the same land, the complaint and proof should show distinctly and unequivocally the date when the permanent injury to the land took place, and the annual injury to crops prior to that date. It may be that different portions of the land became permanently injured at different dates. This should also appear.

But, again, the evidence discloses that plaintiffs claim to own 240 acres of land, and shows that only 70 acres were so totally and permanently injured. There is neither allegation nor proof as to whether the remaining 170 acres are susceptible of raising crops, or whether, if so, any crops thereon had ever been injured. Plaintiffs might recover for such total and permanent injury to the 70 acres, and also for injuries to crops on the remainder, but would be compelled to allege the proper facts in that regard to warrant a recovery.

The complaint and evidence in this case are very general, and it cannot be ascertained from either when such total and permanent injury to any of the land was actually completed. It must have occurred before the suit was commenced, or plaintiffs could not recover for the same. The record discloses that plaintiffs were permitted to recover for injuries to crops up to the date of the commencement of the suit, so that, if plaintiffs were entitled to recover for the permanent injury to the same land, some length of time must have elapsed before the commencement of the suit for which plaintiffs were allowed to recover double damages; that is, for injury to the crops and for permanent injury to the same land. Therefore an error was committed prejudicial to the defendant, and the case must be reversed.       ♦

3. It is further disclosed by the record that plaintiffs procured a conveyance of this property from the Northern Pacific Railroad Company, acknowledged on the 26th day of January, 1900. Plaintiffs, therefore, could not recover for any injury arising from a destruction of the crop, by reason of the nuisance complained of, prior to that date, unless they introduced evidence showing that they were in possession of the property or entitled to such possession, and were entitled to recover for injuries to such possession.

4. Again, the record discloses that the defendant became the purchaser of the smelting and reduction plant, through the operation of which the nuisance complained of occurred, in 1897. It is clear that the defendant could not be held liable in this or any other action for damages caused by the operation of such plant by its predecessors in interest. If such damage arose, plaintiffs or their predecessors in interest were entitled to recover against the predecessors in interest of this defendant for such damage prior to the date when defendant became the purchaser and went into possession and operation of the property. Therefore, under any theory, plaintiffs could not recover damages against this defendant which were the result of acts committed prior to the day it became owner of the plant.

5. Many assignments of error are predicated upon the action of the court in overruling defendant's objections to certain questions propounded to plaintiffs' witnesses which called for an answer as to the effect the polluted water had upon plaintiffs' lands and crops, and as to the extent of the injury to plaintiffs' property. Counsel for appellant contends that such testimony amounts merely to inferences, opinions and conclusions of the witnesses from existing facts, and not to facts within their own knowledge; that it was for the jury to ascertain and determine the effect of these waters upon plaintiffs' land and crops, and the damage resulting therefrom, that such determination could only be reached by the jury from a consideration of the facts, testified to by witnesses, disclosing the extent of the pollution of the water, and the condition of the land and crops after such water had been introduced thereon; that this condition was a fact, and the result and effect of the water and damage occasioned thereby was a conclusion from such facts; that it is the province of witnesses to testify as to the existence of such facts, and of the jury to draw and determine the conclusions to be reached therefrom; that to allow witnesses to draw these conclusions and testify to the same invades the province of the jury.

These conditions seemingly raise the very perplexing questions as to when a non-expert witness may give his opinion, upon which the authorities are numerous and very much at war with each other. In the first place, we are of the opinion that these questions, in so far as the effect of the water on the land and crops was concerned, did not call for the opinions, inferences or conclusions of the witnesses from the facts, but for tangible, visible facts themselves, which resulted from a combination of other existing facts. If the waters destroyed the crops or the lands, or ruined the land for agricultural purposes, such effect, when disclosed, would be a fact within the knowledge of all witnesses who observed it.

In considering the testimony of witnesses as to the amount of plaintiff's injury because of the nuisance, however, we enter the domain of opinions, inferences and conclusions of witnesses.

As to non-expert witnesses, the general principles of evidence require them to testify as to facts within their own knowledge, and not to opinions, inferences and conclusions from existing facts. (Section 3121, Code of Civil Procedure.) There are, however, many exceptions to these principles, and no general rule can be announced whereby the existence of all these exceptions can be accurately stated. But some are so generally accepted that no rule as to the determination of their existence need be invoked. For instance, this court has recognized the exception of proof of value when the witness has shown himself qualified to express an opinion thereon. (*Holland v. Huston*, 20 Mont. 84, 49 Pac. 390; *Emerson v. Bigler*, 21 Mont. 200, 53 Pac. 621; *Porter v. Hawkins*, 27 Mont. 486, 71 Pac. 664.) This exception has been recognized by the courts almost uniformly. We have seen that the measure of damage to the land permanently injured is the difference between its value before and after the injury. Given testimony of this value, which may be shown by the opinions of non-expert witnesses, the determination of the amount of injury or damage is a mere matter of computation, and, upon reason and weight of authority, its computation may be made and given to the jury by non-expert witnesses when they do so in connection with the facts showing competency. (Lewis on Eminent Domain, Secs. 436, 437, and cases cited; Rogers on Expert Testimony, 154, and cases.) The knowledge of the witnesses can always be thoroughly tested on cross-examination, and a jury can be trusted to give the evidence such weight only as it deserves. There was no showing of the competency of many of the witnesses, and therefore the admission of their testimony was erroneous. The question of such competency is for the court, and upon another trial plaintiffs may prove the competency of the witnesses before the introduction of their testimony.

6. One of the plaintiffs, while on the witness stand, produced a sample of water taken from Deer Lodge river above their ranch, which was received in evidence. Counsel for defendant asked of this witness the following question on cross-

examination: "Don't you know that the sewerage of the city of Butte is dumped into Deer Lodge river above your ranch, and above where you took out this sample of water?" This question was excluded by the court, and, in our opinion, was clearly competent as proper cross-examination, and should have been allowed.

7. Again, one of the plaintiffs, while a witness, was allowed to give in evidence some of the contents of a written contract between plaintiffs and the Northern Pacific Railroad Company for the purchase of the land in question, without properly accounting for the absence of the contract. This was erroneous under former decisions of this court, but on another trial like error may be avoided, and further reference does not seem necessary.

8. Another important question upon which error is assigned must be considered. The evidence discloses that defendant became the purchaser of the reduction plant, the use of which is alleged to have contributed to the nuisance in question, in 1897. Counsel for appellant contend that defendant cannot be held liable to pay damages for a continuance of this nuisance, without allegation and proof of notice to defendant of the existence of the nuisance, and of the damage accruing therefrom. There is no doubt but this is a correct statement of the common-law rule as it has existed since the *Pendruddock Case*, decided in Lord Coke's time. It has been adopted and followed with great uniformity by the courts of this country, and, were it not for Section 4554 of our Civil Code, we should not hesitate to indorse and follow it. This section reads as follows: "Every successive owner of property, who neglects to abate a continuing nuisance upon, or, in the use of, such property, created by a former owner, is liable therefor, in the same manner as the one who first created it." Counsel for appellant cite this section, and then say, "This provision of the Code has been interpreted in *Grigsby v. Clear Lake Water Co.*, 40 Cal. 396," and then quote from the opinion in that case language which sustains the principle for which they contend.

An investigation of the statutes of California discloses that the section of the statute of that state (3483, Civil Code), identical with Section 4554, above quoted, was first adopted in 1872. The case above referred to was decided in 1870. It cannot be considered as construing a statute not then in existence. True, the annotators of both the California Codes and those of our own state cite this case under the sections above referred to, which would naturally lead one to believe that it is cited as a construction of such sections. If such citation was so intended, it was done either through inadvertence or mistake, as is clearly shown above.

The enactment of Section 3483 of the California Code may have been induced by the rendition of the decision above referred to; at all events, in our judgment it is directly contrary to the principle announced in the decision, and makes the successor to title to property who does not abate a continuing nuisance in the use of such property, which has been created by a former owner of the property, liable therefor in the same manner as the owner who first created it. Here it may be gathered from the pleadings and evidence that the nuisance complained of was created by defendant's predecessors in interest by the use of the property. There is no showing that defendant abated or sought to abate it, but, on the contrary, it appears conclusively that it continued the nuisance. Therefore the question of the necessity of notice to it, as claimed by the counsel, must be determined by the law as applicable to its predecessors in interest, and, if the law does not require notice to them, none was necessary to this defendant, under the plain provisions of Section 4554, *supra*. We find no cases holding that the creator of a nuisance need be given notice of its existence before suit is brought against him, and we believe none exists. Every man is charged with the knowledge of the results of his own acts, and every one must so use his own property as not to injure his neighbor's.

Defendant pleads Section 29, Code of Civil Procedure, 1887, and Sections 484, 524 and 513 (as amended), Code of Civil



Procedure, as a complete defense to plaintiffs' cause of action, and also pleads Subdivision 1, Section 524, Code of Civil Procedure as a partial defense. It is difficult to determine from the instructions given which section of the statute of limitations the lower court determined was applicable to the case on the trial, because in paragraph 5 of the charge the jury was instructed that plaintiffs might recover for injuries committed at any time within five years prior to the commencement of the suit, while in paragraph 6 of the instructions the plaintiffs were limited to injury committed within two years prior to the commencement of the suit. These instructions are inconsistent and conflicting with each other, and it is entirely impossible to determine which charge the jury followed in making up their verdict. Ordinarily this would be sufficient to reverse the case, but, inasmuch as a new trial must be granted for other reasons, we shall not discuss the effect of these conflicting instructions. It may be well to announce, for the guidance of the lower court upon another trial, that, if any part of the statute of limitations is at all applicable under this opinion, it would be Section 518 of the Code of Civil Procedure—which is not pleaded, as this is not an action arising under either of the sections pleaded in the answer.

We advise that the judgment and order appealed from be reversed.

PER CURIAM.—For the reasons stated in the foregoing opinion, the judgment and order are reversed, and the cause is remanded.

COOMBS ET AL., APPELLANTS, v. BARKER ET AL.,  
RESPONDENTS.

(No. 2,021.)

(Submitted November 18, 1904. Decided January 10, 1905.)

*Corporations—Directors—Relation to Stockholders—Purchase  
of Corporate Property by Directors—Redemption from Exe-  
cution — Bona Fide Purchasers—Evidence—Suits for Ac-  
counting—Credits.*

Corporations—Directors—Stockholders—Fiduciary Relation.

1. Directors of a corporation stand, in equity, in a fiduciary relation to the corporation and stockholders, and are not allowed to profit by virtue of their position.

Corporations—Directors—Profits—Trustees.

2. If by their acts the directors of a corporation have received any profits from the company's property or business, they hold the same as trustees for the benefit of the corporation and its stockholders.

Corporations—Directors—Transactions Voidable—When.

3. Transactions mad by a director of a company with reference to its property, whereby he obtains a profit, are voidable by the company or its stockholders, if action is taken within a reasonable time.

Corporations—Directors—*Bona Fide* Transactions—Burden of Proof.

4. The burden is on directors of a corporation to show that transactions had by them with the corporation, from which they make a profit, are fair and *bona fide*.

Corporations—Directors—Creditors of Corporation.

5. Directors of a corporation may become its creditors and enforce their claims against the corporation by the same methods as any other creditors, but in all such cases the contract is viewed with distrust by the courts, and is subject to the strictest scrutiny, and may be enforced only when it is fair and equitable.

Corporations—Directors—Purchasers—Judicial Sales of Corporate Property.

6. A director of a corporation may become a purchaser of its property at a judicial sale, when such sale is made by another creditor, and when the director has no control over the proceedings; or he may purchase from a purchaser at a judicial sale, but the acts of the purchasing director must be fair and honest, in either case, and he must not be permitted to obtain a dishonest advantage over the corporation or its stockholders.

Corporations—Redemption of Corporate Property by Directors.

7. A redemption, by the directors of a corporation of corporate property, sold under execution, could not be deemed fair and *bona fide* where the judgment under which the redemption was made was rendered in favor of one of their number only two days before the redemption, on a default based upon the acceptance of service of summons by another of their number.

Corporations—Directors—Breach of Duty—Fraud in Law.

8. A breach of official duty on the part of the directors of a corporation is fraud in law, and sufficient to warrant relief if proven, though no fraud in fact is alleged.

**Corporations—Redemption of Corporate Property by Directors—Third Persons.**

9. One who joined with the directors of a corporation, knowing that they were directors, in the redemption of corporate property, was charged with knowledge of the principle of law that such directors could not redeem the property in their own names.

**Agency—Redemption of Property.**

10. One who joins, through an agent, in the redemption of property is charged with all the knowledge that the agent possesses concerning the matter.

**Corporations—Redemption of Property—Directors—Third Persons—Fraud.**

11. One who was present at the time the redemption of property was agreed upon between directors of the corporation which owned the property, and who took part in the redemption, was charged with knowledge that the transaction was constructively fraudulent as against the corporation and its stockholders, and stood in no better position than the directors involved.

**Corporate Property—Redemption—Agent—Good Faith—Evidence.**

12. Evidence held insufficient to show that one who joined with directors, through an agent, in redeeming corporate property was a *bona fide* purchaser for value, without notice of the unlawful acts of the directors, and for a valuable consideration paid before he acquired such notice.

**Corporations—Directors—Redemption of Mining Property and Working Same as Their Own—Accounting.**

13. Where directors redeemed corporate mining property, sold under execution, and held and worked it as their own, they were entitled, on being sued by the stockholders, to obtain an accounting and to a credit for whatever money they had actually paid out for the use and benefit of the company, such as money paid for the redemption of the property, in satisfaction of *bona fide* claims against the same, with interest, and also for the reasonable expenses of extracting ore from the property after redemption.

*Appeals from District Court, Cascade County; J. B. Leslie, Judge.*

ACTION by Frank Coombs and others, on their own behalf and on behalf of all other stockholders of the Montana Gold, Silver, Platinum & Tellurium Mining Company, a corporation, against David L. S. Barker and others, to have a redemption made by the directors of the company from an execution sale, declared to have been made in favor of the company, to have the individual defendants who obtained the sheriff's deed declared trustees of the property, and to obtain an accounting. From an order granting a new trial to certain defendants, and overruling a motion for new trial as against other defendants, and from a judgment in favor of certain defendants, plaintiffs appeal; and from a judgment against them, and from an order overruling in part their motion for a new trial, certain defendants appeal. Reversed.

*Messrs. H. G. & S. H. McIntire, and Mr. Fletcher Maddox,*  
for Respondents.

The lower court apparently acted on the theory that the mere fact that the purchase or redemption from the purchasers at the sheriff's sale was made by defendants at the time they were directors of the company, even though they were *bona fide* judgment creditors of the company, seeking to protect their rights as such, was a legal fraud and that the title so acquired by them was voidable at the suit of any of the stockholders of the company. But that this theory is erroneous and is against the overwhelming weight of authority, is, we submit, beyond reasonable controversy. (3 Thompson's Commentaries on Law of Corporations, Sec. 4068; *Hallam v. Indiana Hotel Co.*, 56 Iowa, 178; *Beach v. Miller*, 130 Ill. 162, s. c. 17 Am. St. Rep. 291; *Mulanphy Savings Bank v. Schott*, 135 Ill. 655, s. c. 25 Am. St. Rep. 401; *Gorder v. Plattsmouth Canning Co.*, 36 Neb. 548, s. c. 54 N. W. Rep. 830; *Johnson v. Cottingham Iron, etc. Co.*, 8 Mo. App. 575; *Borland v. Haven*, 37 Fed. 394; *McMurty v. Montgomery Masonic Temple Co.*, 86 Ky. 206, s. c. 5 S. W. Rep. 570; *Duncomb v. New York, etc., R. Co.*, 88 N. Y. 1; *Baker v. Harpster*, 42 Kan. 511, s. c. 22 Pac. 415; *Stratton v. Allen*, 16 N. J. Eq. 229; *Hayward v. Pilgrim Soc.*, 21 Pick. (Mass.) 270; *Geer v. School District*, 16 Vt. 76; *Merrick v. Peru Coal Co.*, 61 Ill. 472; *Sawyer v. Methodist Episcopal Soc.*, 18 Vt. 405; *Ward v. Salem St. R. Co.*, 108 Mass. 332; *Bank Com'rs v. St. Lawrence Bank*, 8 Barb. (N. Y.) 436, s. c. 7 N. Y. 513; *Farmers, etc. Bank v. Downey*, 53 Cal. 466, s. c. 31 Am. Rep. 62; *Rider v. Union India Rubber Co.*, 5 Bosw. (N. Y.) 85; *Bluck v. Mallalue*, 27 Beav. 398; *Twin Lick Oil Co. v. Marbury*, 91 U. S. 587, s. c. 3 Cent. L. J. 98; 13 Albany Law Journal, 112; *Hoyle v. Plattsburgh, etc. R. Co.*, 54 N. Y. 314, s. c. 13 Am. Rep. 595; *College Park El. Belt Line v. Ide*, (Texas) 40 S. W. 64; *Oregon City v. Clackmas County*, (Ore.) 52 Pac. 313; *Richardson's Ex'r v. Green*, 133 U. S. 30; *Patterson v. Portland S. & R. W.*, (Ore.) 56 Pac. 410; *Janney v. Minneapolis Ind. Exposition*, 50 L. R.

A. 276; *Saltmarsh v. Spaulding*, 147 Minn. 224; *Horback v. Marsh*, 37 Neb. 22; *Garret v. Burlington Plow Co.*, 70 Iowa, 697; *Converse v. Sharp*, 56 N. E. 71; *Bonney v. Tilley*, 42 Pac. 439; *Off v. Jack*, 68 N. E. 427; *Wyman v. Bowman*, 127 Fed. 257.)

Defendants had the legal right to become creditors of the corporation; as such they had the right to merge their claims into judgment liens against the property of the company; they also had the right to purchase such claims and liens from others. (*Bonney v. Tilley*, 109 Cal. 346, s. c. 42 Pac. 439; *St. Louis, etc. R. Co. v. Chenault*, 36 Kan. 51, s. c. 12 Pac. 303; *Freeman on Executions*, 2d Ed., Sec. 321.)

A trustee may purchase the trust property at a judicial sale brought about by a third party, which he had taken no part in procuring and over which he could not have had control. (See *Allen v. Gillette*, 127 U. S. 596, citing *Prevost v. Gratz*, 1 Pet. C. C. 364, 378, *Twin Lick Oil Co. v. Marbury*, 91 U. S. 587; *Chorpenning's Appeal*, 32 Pa. St. 315; *Fisk v. Sarber*, 6 W. & S. 18; *Pewabic Mn'g Co. v. Mason*, 145 U. S. 361; *Clark v. Holland*, 33 N. W. 352; *Rothchild v. Memphis, etc. R. Co.*, 113 Fed. 476; *Felton v. Le Breton*, 92 Cal. 467.)

If the stockholder, after a full knowledge of the facts, stands by and allows large operations to be completed or money expended, or alterations to be made, before he brings suit, he is guilty of laches, and his remedy is barred. (2 Cook on Corporations, 5th Ed., Sec. 733, pp. 1864-5, and cases cited.) The circumstances of the discovery of the facts must be fully stated and proved, and the delay which has occurred must be shown to be consistent with the requisite diligence. (2 Cook on Corporations, 5th Ed., Sec. 731, and note; *Wood v. Carpenter*, 101 U. S. 135-143; *New Albany v. Burke*, 11 Wall. 96-107; *Wulff v. Townsite Co.*, 15 Mont. 49; *Johnston v. Mining Co.*, 148 U. S. 360; *Richardson v. Mackall*, 124 U. S. 183; *Hoyt v. Latham*, 143 U. S. 553; *Hayward v. The Bank*, 96 U. S. 611; *Grymes v. Sanders*, 93 U. S. 55; *Curtis v. Larkin*, 94 Fed. 251.)

Stockholders of a corporation are so far integral parts of the corporation as to be privy to and conclusively bound by judgments against their corporation. (2 Black on Judgments, Sec. 583; *Hawkins v. Glenn*, 131 U. S. 329; *Nat'l F. & P. Works v. Oconto Water Co.*, 68 Fed. 1007; 1 Cook on Corporations, 5th Ed., Sec. 209 and notes.)

It was not fraudulent conduct on the part of these defendants not to inform the plaintiff stockholders of the outstanding judgments against the company, for as stockholders of the company they were privy to and conclusively bound by said judgments. (2 Black on Judgments, Sec. 583; *Hawkins v. Glenn*, 131 U. S. 329; *Nat'l F. & P. Co. v. Oconto Water Co.*, 68 Fed. 1007.) A purchase by a trustee of trust property is not void but only voidable at the election of the *cestui que trust* within a reasonable time. "The purchase money and expenditures for repairs and permanent improvements must be refunded and complete equity must be done between the parties, to authorize setting aside such purchase." (Foot note from 13 L. R. A. p. 493; *Yeackel v. Litchfield*, 13 Allen, 419; *Covington etc. Ry. Co. v. Bowler*, 4 Bush. 468; *Mason v. Martin*, 4 Md. 124; *People v. Merchants' Bank*, 35 Hun. 100.)

*Mr. A. C. Gormley, and Messrs. Walsh & Newman, for Appellants.*

It was the duty of the directors to protect the property of the company, and not to use their official position for their own gain. A director cannot create a relation which will make his interests antagonistic to that of his beneficiary. (3 Thompson on Corporations, Sec. 4011; *Cook v. Sherman*, 20 Fed. 157.) Where a director secures himself any advantage over other stockholders, equity will treat the transaction as void. (3 Thompson, 4016, 4050, 4060.) Contracts made with a corporation by a director are not void *per se*, but voidable at the option of the corporation. (3 Thompson on Corporations, Sec. 4061; *Thomas v. R. R. Co.*, 109 U. S. 522.) A director, before redeeming for his own benefit, must give the stockholders an op-

portunity to make advances to save the company, and if they refuse he then has the right to purchase. (3 Thompson on Corporations, Sec. 4074.)

Courts will not permit any investigation into the fairness or unfairness of the transaction, or allow the trustee to show that the dealing was for the best interest of the beneficiary, but will set the transaction aside at the mere option of the *cestui que trust*. (*Wickersham v. Crittendon*, 94 Cal. 17, 28 Pac. 790.) Where a party is a willful trespasser, or does not act in good faith, he is liable for the value of the ore extracted, without any allowance for expenses incurred in extracting it. This rule is well established by the following authorities: *Barringer & Adams on Mines*, pp. 693-6; 2 *Snyder on Mines*, Secs. 1622-3; 2 *Lindley on Mines*, Sec. 868; *Woodenware Co. v. U. S.*, 106 U. S. 432, Book 27, p. 230; *Benson Mining & Smelting Co. v. Alta M. & S. Co.*, 145 U. S. 428, Book 36, p. 762; *St. Claire v. Cash Gold M. & M. Co.*, 47 Pac. 488.

To make the defense of laches available, it must be shown that the party pleading it has, by reason of such laches, been placed in a worse position than he would have been if the suit had been commenced earlier. Facts must be shown which would amount to an equitable estoppel. (*Norris v. Haggin*, 136 U. S. 386; *Bryan v. Kales*, 134 U. S. 126; *Warner v. Daniels*, Fed. Cases 17,181; *Culver v. Pierson*, 15 Atl. 269; *Fitzgerald v. Fitzgerald et al.*, 62 N. W. 899; *Pence v. Langdon*, 98 U. S. 578; *Veazie v. Williams*, 8 How. 134; *Guernsey v. Davis*, 73 Pac. 101; *Pacific R. R. v. Atlantic R. Co.*, 20 Fed. 277; *Current Law*, p. 1063, Sec. 3; *Anderson v. Northrop*, 12 So. 318; *Van Zile Eq. Pl. Sec. 151*; *Petrie v. Badenoch*, 47 Am. St. Rep. 503; *Green v. Winter*, 1 Johns Ch. 26.)

If a trustee acts in good faith, he must account only for the profits; but if he acts fraudulently, or in bad faith, or becomes trustee *ex maleficio*, he is not entitled to recover his expenses. (*Hanna v. Clarke*, 53 Atl. 757; *Fellows v. Loomis*, 53 Atl. 999; *Hart's Estate*, 53 Atl. 370; *Barryhill's Appeal*, 35 Pa. St. 245; *Robinett's Appeal*, 36 Pa. St. 174.) A trustee cannot

evade the rule prohibiting him from purchasing the property, by having it purchased in his wife's name. (See *Hindman v. O'Connor*, 13 L. R. A. 490; *Hoffman S. C. Co. v. Cumberland C. J. Co.*, 16 Md. 456; *Cumberland C. I. Co. v. Sherman*, 30 Barb. 553; *Dundas Appeal*, 64 Pa. St. 325-332; *Davoue v. Fanning*, 2 Johns Ch. 251; *Gardner v. Ogden*, 22 N. Y. 327; *Case v. Carroll*, 35 N. Y. 385; Story's Eq. Jur. Sec. 1261-1265.)

MR. COMMISSIONER CLAYBERG prepared the opinion for the court.

Five separate appeals are presented for review by the record herein, viz.: (1) By plaintiffs from an order granting a new trial in part to defendants David L. S. Barker, John C. E. Barker and J. T. Armington; (2) by plaintiffs from a judgment rendered in favor of Timothy E. Collins and Lavina A. Collins, and representatives of the estate of E. J. Barker, deceased; (3) by plaintiffs from an order overruling their motion for a new trial against Timothy E. Collins and Lavina A. Collins, and the estate of E. J. Barker, deceased; (4) by defendants David L. S. Barker, John C. E. Barker and J. T. Armington from a judgment entered against them; (5) by these same defendants from an order overruling in part their motion for a new trial. By stipulation contained in the record, but one transcript is presented for all these appeals. They were argued together, and will be considered and decided together.

The action was brought by T. C. Power & Bro., Frank Coombs, Annie S. Turner, Charles Duer, Kyle Price, E. M. Edwards, J. J. O'Marr, the estate of J. T. Bell, deceased, A. E. Thomas, W. D. Graves, D. G. Auchey and J. E. Kanouse, as stockholders in the Montana Gold, Silver, Platinum & Tellurium Mining Company, in their own behalf and in behalf of all other stockholders of said company who might come in and join in the prosecution of the suit, as plaintiffs, against David L. S. Barker, John C. E. Barker, J. T. Armington, Timothy E. Collins, Lavina A. Collins, David L. S. Barker as administrator



of the estate of E. J. Barker, deceased, Marcella O'Leary as special administratrix of the estate of E. J. Barker, deceased, W. F. O'Leary as guardian *ad litem* of Edmund J. Barker, minor son and heir of E. J. Barker, deceased, and the Montana Gold, Silver, Platinum & Tellurium Mining Company, as defendants.

The objects of the suit are to have a certain redemption made by the directors of the Montana Gold, Silver, Platinum & Tellurium Mining Company from an execution sale of the property of said company declared to have been made in favor of the company and its stockholders, to have the individual defendants who obtained the sheriff's deed to the property declared trustees of said property, to obtain an accounting by such defendants of the proceeds of said property while in their possession, to quiet title to the property, and for general relief.

Briefly stated, the complaint, in so far as its allegations are important on this hearing, is as follows: It alleges the corporate existence of defendant company, and that plaintiffs are stockholders therein; that defendants David L. S. Barker, John C. E. Barker, J. T. Armington and Timothy E. Collins were and are directors of defendant company, and stockholders therein; that defendants John C. E. Barker and J. T. Armington are the president and secretary, respectively, of said mining company; that E. J. Barker, deceased, was at the time of his death a stockholder and acting director. It alleges the appointment and qualification of David L. S. Barker as administrator of the estate of E. J. Barker, deceased, of Marcella O'Leary as special administratrix of the estate of E. J. Barker, and of W. F. O'Leary as guardian *ad litem* of Edwin J. Barker, minor son and heir of E. J. Barker, deceased; that on the 3d day of February, 1898, one John R. Fitzsimmons recovered a judgment against the defendant mining company for the sum of \$2,577.94, and \$19.50 costs, upon which execution was duly issued, under which a sheriff's sale was had on the 3d day of March, 1898, of all property of the company (which is then specifically described) to William Silverman and Laura Coombs

for the sum of \$2,900; that on the 2d day of March, 1899, defendants John C. E. Barker, Edwin J. Barker, David L. S. Barker, J. T. Armington and Timothy E. Collins, acting through and in the name of his wife, Lavina A. Collins, redeemed said property for the sum of \$6,145.90, which included the purchase price on the sheriff's sale, with interest and costs, and also two other prior judgments, and the sum of \$13 taxes; that redemption was made by the parties as owners and holders of a judgment in favor of John C. E. Barker against the defendant mining company for the sum of \$3,184.70; that on the 12th day of June, 1899, the sheriff executed a deed for said property so sold and redeemed, but that the deed was not called for until the 7th day of September, 1900, when it was taken and recorded; that on the 27th day of March, 1899, Edwin J. Barker filed articles of incorporation of the Big Snowy Mining Company, in which said redemptioners were named as directors and stockholders of all the stock in the corporation; that the Big Snowy Mining Company was organized with the intent on the part of the incorporators to transfer to said company all the property so redeemed, intending thereby to deprive the stockholders in said defendant mining company, other than said incorporators, of all their interest in the property, but that no conveyance or transfer to such company had yet been made; that since the redemption the defendants have exercised exclusive ownership and control of the property, and have, by the operation and leasing thereof, realized profits of several thousand dollars, the amount of which is unknown to plaintiffs, but that they greatly exceed the amount paid by defendants for the redemption of the property; that defendants have kept for their own use and benefit all of said moneys, and have never accounted therefor to said defendant mining company, to the plaintiffs, or to the other stockholders; that Timothy E. Collins, husband of Lavina A. Collins, claims an interest in the property with the other defendants, as represented by the interest of said defendant Lavina A. Collins; that defendant John C. E. Barker on the 4th day of March, 1899, conveyed to Edwin J. Barker

his pretended interest in the property, but still claims and asserts an interest in the property; that the defendants and directors of the mining company defendant have never at any time, either before the rendition of any of the judgments set forth or since, called a meeting of the stockholders of the defendant mining company for the purpose of seeing what might be done towards protecting its interest in the property, and that neither of said defendants and directors, or any of them, have attempted in any way to protect the interests of the corporation by paying its said indebtedness or making a redemption of said property for its benefit, but that all acts of said defendants and directors have been done and performed for their own individual benefit, and for the purpose of acquiring said property for themselves, and to deprive the mining company defendant and the remaining stockholders of the same, and that defendants threaten to hold said property for themselves, and adverse to the mining company and its stockholders other than themselves; that the defendants have never informed the mining company defendant or its stockholders of the adverse interest in said property so acquired by them, but have acted in bad faith toward the said mining company, and in fraud of its and plaintiffs' rights in the premises; that none of the plaintiffs knew that the defendants were intending to hold said property in their own individual right, or in hostility to the rights of the company and plaintiffs, until the recording of the sheriff's deed; that defendants have acquired no right, title or interest in said property, but that the redemption should be declared to be a redemption for and in behalf of said defendant mining company and plaintiffs and other shareholders who may come in and share the expense of the action; that the certificate of redemption and sheriff's deed issued to defendants cast a cloud upon the title of said property, which should be set aside and held for naught. The complaint then alleges the commencement of a suit in the name of the defendant mining company against the other defendants in this suit to obtain the same relief as sought in this action; that summons was issued and served on all the defend-

ants; that some of them moved to strike the complaint from the files on the ground that it was not verified by any of the officers of the corporation; that other defendants demurred to the complaint, and, upon presentation of said motion and demurrers to the court, the same were sustained, and the bill dismissed. Then follows the prayer for an accounting and other relief.

To this complaint the defendants filed separate general demurrers, which were overruled. They then, with the exception of the mining company defendant, filed separate answers. The substance of each, in so far as important to these appeals, is as follows:

Answer of Timothy E. Collins and Lavina A. Collins: Denies that Timothy E. Collins was a party to the redemption of the lands, or that he was acting for himself, in the name of his wife, Lavina A. Collins, and alleges that Lavina A. Collins effected the redemption in her own behalf, and that Timothy E. Collins had no interest in the property so redeemed, and has never had any such interest since its redemption. Denies that Timothy E. Collins was a party to the incorporation of the Big Snowy Mining Company. Admits that since the redemption the defendants David L. S. Barker, John C. E. Barker, E. J. Barker and his estate, J. T. Armington and Lavina A. Collins have exercised ownership and exclusive control over said property, but denies that Timothy E. Collins has had or exercised any control or ownership over the property. Admits that Lavina A. Collins has received as profits arising from said property a sum to exceed \$400, but denies that Timothy E. Collins has ever received any profits. Admits that Timothy E. Collins is the husband of Lavina A. Collins, but denies that he claims any right, title or interest in or to said property since the redemption thereof. Alleges that Lavina A. Collins has the right to an undivided one fifth interest in said property redeemed in her own right. Admits that no meeting of the stockholders was ever called or had as alleged in the complaint, and that defendants, except Timothy E. Collins, have acquired said property for themselves, and that they intend to hold the same adversely to

the defendant mining company and stockholders. Denies that the board of directors, or any of them, acted in bad faith in permitting the property to be sold, and denies that they omitted to do anything which they were in duty bound to do as directors. Denies that plaintiffs did not have any notice of the sale and redemption of the property, and that plaintiffs did not know that defendants intended to hold said property for their own use and adversely to the rights of the corporation, and alleges that the transactions were had in good faith, openly and publicly, and that the transactions with reference to the sale and redemption of the property were made publicly. Upon information and belief, alleges that all of said transactions were within the knowledge of plaintiffs. Admits that Timothy E. Collins had not acquired any right, title or interest to said property. Denies that Lavina Collins has not acquired any interest. Alleges that she holds an undivided one-fifth interest thereof; that she is an innocent purchaser thereof; that she has a good right, title and interest as against the plaintiff and as against the world. Alleges that plaintiffs have stood by and permitted the property to be sold; allowed the defendants, except Timothy E. Collins, to expend a large amount of money in the redemption of the property, well knowing that it was advertised for sale, sold and redeemed by these defendants other than Timothy E. Collins, and did not attempt to bring any action until, by the work and labor of defendants, bodies of ore of considerable value were discovered; that, by reason of laches, plaintiffs are now estopped from instituting this suit.

Answer of Marcella O'Leary, special administratrix of the estate of E. J. Barker, deceased: Admits that, at the time of the beginning of the suit, David L. S. Barker was administrator of the estate of E. J. Barker, deceased, but alleges that he has been superseded by herself as special administratrix of the estate. Admits that the defendant mining company was incorporated; that the property described in the complaint was sold at sheriff's sale; that it was afterwards redeemed as alleged in the complaint; that one-fifth was redeemed by E. J. Barker;

that one-fifth was redeemed by John C. E. Barker, which was afterwards conveyed to E. J. Barker. Admits that the estate of E. J. Barker claims an undivided two-fifths interest in all the property described in plaintiffs' complaint, and claims it adversely to plaintiffs. Alleges that E. J. Barker purchased said two-fifths interest, and paid therefor in good faith; that all the acts done by said E. J. Barker and his grantor, John C. E. Barker, in the redemption of said property, were done in good faith and without fraud. Alleges that plaintiffs stood by and permitted judgment to be entered against the company, and the property sold, and the same to be redeemed by the defendants; that plaintiffs saw the defendants part with their money in good faith, well knowing such property had been redeemed by defendants as individuals; and that therefore plaintiffs are estopped to maintain the action.

Answer of J. T. Armington: Denies that the mining company defendant has been carrying on business since the year 1897, that any of the defendants have acted as directors since 1897, and that the Big Snowy Mining Company was organized with the intent or design to deprive any one of any interest in the property. Alleges that the defendant mining company at the time of the redemption had no assets whatever to pay off the judgments mentioned in the complaint, save the property sold at sheriff's sale; that none of the stockholders showed any willingness or desire to advance the necessary funds to pay off the judgments, although they all well knew of the same, and of the sale of the property to satisfy the same, "and for that reason, and no other, defendant assisted in the redemption of said property as alleged in the complaint." Denies that the stockholders were not informed of said judgment and sheriff's sale thereunder. Denies that he or any of his codefendants acted in bad faith or fraud of any of plaintiffs' rights in the premises. Denies that plaintiffs did not know that the redemption of said property was intended for the benefit of the redemptioners. Alleges that plaintiffs well knew that the defendants redeemed the property openly and without bad faith, and, after such re-

demption, expended large sums of money in developing and exploiting the property; that the redemption was made with their own money, and in good faith, and with no design to defraud plaintiffs.

The answer of David L. S. Barker contains substantially the same admissions, denials and affirmative allegations as those contained in the answer of Armington.

Answer of John C. E. Barker: Denies that the organization of the Big Snowy Mining Company was made with the intent or design to deprive any one of his interest in the property. Alleges that the profits realized from operation and leasing of the mining claims amounted to \$12,960.57; that the defendant mining company at the time of the redemption had no assets whatever, save and except the property sold at sheriff's sale; that none of the stockholders showed any willingness or desire to advance the necessary funds to pay off the judgments, although they knew of the same, and of the sale of the property to satisfy the same, "and for that reason, and no other, he assisted in the redemption of the property as alleged in the complaint." Denies that the stockholders of the defendant mining company were not informed of the judgments and sheriff's sale. Denies that he and his codefendants acted in bad faith or fraud of any of the plaintiffs' rights in the premises. Denies that the plaintiffs did not know that the redemption was intended for the benefit of the redemptioners. Denies that defendants have acquired no right, title or interest in the property, or that the sheriff's deed or certificate of redemption casts any cloud on said property, or that the title of the defendant mining company should be quieted. Avers that, in his individual behalf, he consents to a decree transferring all the property so redeemed to the defendant corporation, upon repayment to defendants of the sums of money so paid to effect the redemption, but insists that plaintiffs are not entitled to any accounting, because the defendants, after redeeming the property, expended large sums of money in developing and exploiting the property, in good faith, and in reliance upon the title so acquired in the redemp-

that one-fifth was redeemed by John C. E. Barker, which was afterwards conveyed to E. J. Barker. Admits that the estate of E. J. Barker claims an undivided two-fifths interest in all the property described in plaintiffs' complaint, and claims it adversely to plaintiffs. Alleges that E. J. Barker purchased said two-fifths interest, and paid therefor in good faith; that all the acts done by said E. J. Barker and his grantor, John C. E. Barker, in the redemption of said property, were done in good faith and without fraud. Alleges that plaintiffs stood by and permitted judgment to be entered against the company, and the property sold, and the same to be redeemed by the defendants; that plaintiffs saw the defendants part with their money in good faith, well knowing such property had been redeemed by defendants as individuals; and that therefore plaintiffs are estopped to maintain the action.

Answer of J. T. Armington: Denies that the mining company defendant has been carrying on business since the year 1897, that any of the defendants have acted as directors since 1897, and that the Big Snowy Mining Company was organized with the intent or design to deprive any one of any interest in the property. Alleges that the defendant mining company at the time of the redemption had no assets whatever to pay off the judgments mentioned in the complaint, save the property sold at sheriff's sale; that none of the stockholders showed any willingness or desire to advance the necessary funds to pay off the judgments, although they all well knew of the same, and of the sale of the property to satisfy the same, "and for that reason, and no other, defendant assisted in the redemption of said property as alleged in the complaint." Denies that the stockholders were not informed of said judgment and sheriff's sale thereunder. Denies that he or any of his codefendants acted in bad faith or fraud of any of plaintiffs' rights in the premises. Denies that plaintiffs did not know that the redemption of said property was intended for the benefit of the redemptioners. Alleges that plaintiffs well knew that the defendants redeemed the property openly and without bad faith, and, after such re-



demption, expended large sums of money in developing and exploiting the property; that the redemption was made with their own money, and in good faith, and with no design to defraud plaintiffs.

The answer of David L. S. Barker contains substantially the same admissions, denials and affirmative allegations as those contained in the answer of Armington.

Answer of John C. E. Barker: Denies that the organization of the Big Snowy Mining Company was made with the intent or design to deprive any one of his interest in the property. Alleges that the profits realized from operation and leasing of the mining claims amounted to \$12,960.57; that the defendant mining company at the time of the redemption had no assets whatever, save and except the property sold at sheriff's sale; that none of the stockholders showed any willingness or desire to advance the necessary funds to pay off the judgments, although they knew of the same, and of the sale of the property to satisfy the same, "and for that reason, and no other, he assisted in the redemption of the property as alleged in the complaint." Denies that the stockholders of the defendant mining company were not informed of the judgments and sheriff's sale. Denies that he and his codefendants acted in bad faith or fraud of any of the plaintiffs' rights in the premises. Denies that the plaintiffs did not know that the redemption was intended for the benefit of the redemptioners. Denies that defendants have acquired no right, title or interest in the property, or that the sheriff's deed or certificate of redemption casts any cloud on said property, or that the title of the defendant mining company should be quieted. Avers that, in his individual behalf, he consents to a decree transferring all the property so redeemed to the defendant corporation, upon repayment to defendants of the sums of money so paid to effect the redemption, but insists that plaintiffs are not entitled to any accounting, because the defendants, after redeeming the property, expended large sums of money in developing and exploiting the property, in good faith, and in reliance upon the title so acquired in the redemp-

tion, all of which was known to the plaintiffs, who raised no objection thereto, but remained silent. Wherefore he claims that plaintiffs are estopped to demand any accounting.

Answer of W. F. O'Leary, guardian *ad litem* of Edwin J. Barker, an infant: Admits that the property described in the complaint was sold at sheriff's sale and afterwards redeemed, as alleged. Admits that a one-fifth interest was redeemed by E. J. Barker, and a one-fifth interest by John C. E. Barker, which was afterwards conveyed to E. J. Barker; that E. J. Barker purchased the said two-fifths interest in said property, and paid therefor in good faith; and that his estate is now owner of said property. Alleges that all the acts done by E. J. Barker and his grantor, John C. E. Barker, in the redemption of the property, were done in good faith and without fraud. The answer then sets forth laches on the part of plaintiffs, as in the other answers, and claims that they should be estopped from maintaining the action.

Each of the answers contain an admission that the property was redeemed as alleged in the complaint. Replications were filed, denying all the affirmative allegations contained in the several answers. Upon the issues thus formed the case was tried before the court, without a jury.

After the taking of testimony, the court made its findings of fact and conclusions of law, which, in so far as they are important upon this hearing, are, in substance, as follows: That the defendant mining company is a corporation, and that the plaintiffs are stockholders therein; that defendants David L. S. Barker, John C. E. Barker, J. T. Armington and Timothy E. Collins are, and for several years last past have been, the duly elected, qualified and acting directors and officers of the defendant corporation, and stockholders therein; that the defendants John C. E. Barker and J. T. Armington have been for several years last past the duly elected, qualified and acting president and secretary, respectively, of the corporation. In findings 3 and 4 the court determined the appointment and qualification of administrators of the estate of E. J. Barker, deceased, and the

guardian of Edwin J. Barker, an infant; that on the 2d day of February, 1898, one John R. Fitzsimmons recovered a judgment against the defendant mining company for \$2,577.94, and \$19.50 costs, upon which an execution was duly issued, the property advertised for sale, and sold on the 3d day of March, 1898, to one William Silverman and one Laura Coombs for the sum of \$2,900 [here follows a description of the property sold, which corresponds with the allegations of the complaint]; that on the 2d day of March, 1899, the said John C. E. Barker, Edwin J. Barker, David L. S. Barker, J. T. Armington and Lavina A. Collins effected a redemption of said property from said sale upon the payment of \$6,145.90, which included the purchase price, with interest, two prior judgments, and the sum of \$13.10 taxes; that the redemption was made by such persons as the owners of a judgment entered in favor of John C. E. Barker on the 28th day of January, 1898, against the defendant mining company, for the sum of \$3,184.70; that in all of the actions, save the last named, the said John C. E. Barker accepted service of summons as president and managing agent of said defendant corporation, and judgments by default were entered, based upon said acceptance of service, and that, in the action of John C. E. Barker against the defendant mining company, J. T. Armington, as secretary of defendant mining company, accepted service of summons, and the judgment by default was entered, based upon the service so accepted; that a certificate of redemption was issued upon the redemption; that on the 12th day of June, 1900, the sheriff executed a deed to said redemptioners, conveying all the property so sold and redeemed as aforesaid, but the deed was not called for until the 7th day of September, 1900, whereupon it was delivered and recorded; that on or about the 27th day of March, 1899, the defendants John C. E. Barker, David L. S. Barker, J. T. Armington, Timothy E. Collins and E. J. Barker duly filed articles of incorporation of the Big Snowy Mining Company, in which said parties were named as directors, and, together with said Lavina A. Collins, as stockholders of all the stock of the corporation; that the

said redemptioners and directors never at any time called a meeting of the stockholders of the defendant corporation for the purpose of seeing what might be done toward protecting its interests and property, nor did they in any way attempt to protect the interests of the said corporation by paying the said indebtedness or effecting a redemption for its own benefit, but that all the acts of said plaintiffs were done and performed individually and for their own benefit, and for the purpose of acquiring said property for themselves, and depriving the defendant corporation and the remaining stockholders of the same; that the defendant directors never informed the defendant corporation or its stockholders of the adverse interest in said property so acquired by them, but acted in bad faith toward the corporation, and in fraud of its and plaintiffs' rights in the premises; that none of the plaintiffs knew that the redemptioners and defendants were attempting or intending to hold said property in their own rights, and in hostility to the defendant corporation and plaintiffs, until the recording of the sheriff's deed; that Edwin J. Barker was a *bona fide* purchaser of an undivided one-fifth interest in the property by virtue of said redemption, and that his estate is a *bona fide* purchaser, without notice, of an undivided one-fifth interest in said property, by virtue of said redemption and sheriff's deed; that Lavina A. Collins was, by virtue of said redemption and of said sheriff's deed, a *bona fide* purchaser of an undivided one-fifth interest in said property, and a purchaser for a valuable consideration, without notice; that the defendants John C. E. Barker, David L. S. Barker and J. T. Armington acquired no right, title or interest in said property by virtue of said redemption and sheriff's deed.

The court then determined the facts concerning the beginning of the suit on behalf of the company on the 4th day of June, 1901, as alleged in the complaint, and further found that plaintiffs brought this action within a reasonable time after the discovery of the fraud, and have not been guilty of any laches; that the defendants John C. E. Barker, David L. S. Barker and J. T. Armington, as officers and directors of the defendant min-

ing company, in attempting to acquire the corporation's property by means of said redemption and sheriff's deed, violated the trust imposed in them as such officers and directors, and thereby committed a fraud, in law, upon said corporation, and its stockholders, including plaintiffs; that by virtue of said acts they became involuntarily trustees of the property of said corporation for the benefit of said corporation and its stockholders, including plaintiffs, and that said redemption should be held for the benefit of the defendant corporation; that Edwin J. Barker and his estate and Lavina A. Collins each acquired a one-fifth interest in said property by virtue of said redemption and sheriff's deed; that said certificate of redemption and sheriff's deed cast a cloud upon the title of said property, which should be set aside and held for naught, so far as the interests sought to be acquired by said John C. E. Barker, David L. S. Barker and J. T. Armington are concerned, and that the title of said defendant corporation in and to an undivided three-fifths of said property should be quieted as against said defendants last named; that plaintiffs are entitled to a decree for the use and benefit of the said defendant company, quieting its title as aforesaid, and to a judgment in their favor for the use and benefit of said mining company against John C. E. Barker, David L. S. Barker and J. T. Armington, jointly and severally. Upon these findings of fact and conclusions of law, the court entered its decree.

Defendants John C. E. Barker, J. T. Armington and David L. S. Barker moved for a new trial, which, after having been argued and submitted, was granted in part. The court ordered: "That the sixth (VI) conclusion of law, in so far as the same finds the plaintiffs entitled to a judgment in their favor, for the use and benefit of the corporation defendant, against the defendants J. C. E. Barker, David L. S. Barker and J. T. Armington, amounting to \$64,411.32, and also that part of the decree heretofore entered in this cause, decreeing that said last-named defendants account to plaintiffs, for the use and benefit of said corporation defend-

ant, for said last-named sum, and decreeing a personal judgment against said defendants therefor, be, and the same are, hereby set aside, canceled and held for naught; and plaintiffs' motion for a new trial is granted for the purpose of ascertaining any proper expenditures made by said defendants J. C. E. Barker, David L. S. Barker and J. T. Armington, and for which they would be entitled to a credit, if any, upon the amount of receipts for ores extracted from the properties described in the complaint, and heretofore found upon the trial of this cause. It being the purpose and intention of this order to grant a new trial only for the purpose of ascertaining the amount, if any, that the plaintiffs, for the use and benefit of the Montana Gold, Silver, Platinum & Tellurium Mining Company, may be entitled to against said last-named defendants on account of ores extracted from the mining properties described in the complaint and decree. And said motion for a new trial as to all other matters is hereby denied."

Motion for a new trial was also made by plaintiffs as against defendants Timothy E. Collins, Lavina A. Collins, Marcella O'Leary as administratrix of the estate of E. J. Barker, deceased, and W. F. O'Leary as guardian *ad litem* of Edwin J. Barker, an infant, which was overruled by the court.

1. Directors of a corporation stand in equity in a fiduciary capacity as to the corporation and stockholders. Whether they should be treated as trustees for such stockholders or company, in the full sense of that term, is immaterial. Standing in a fiduciary capacity, they are not allowed to profit by virtue of their position. They must exercise the utmost good faith in all transactions touching their duties to the corporation and its property. All their acts must be for the benefit of the corporation and not for their own benefit. If by their acts the directors have received any profits from the company's property or business, they hold the same as trustees for the benefit of the corporation and its stockholders. Illustrations of this doctrine are very numerous, and the principles are so well established that citation of authorities seems unnecessary.

Our own court, speaking through Mr. Associate Justice Buck, in the case of *Gerry v. The Bismarck Bank*, 19 Mont. 191, 47 Pac. 810, announces this principle in the following commendable language: "That a trustee should not be allowed to profit by his trust is a well-known fundamental doctrine of equity. No evasions, no technical subtlety of reasoning, no empty distinctions, should be tolerated when the assertion of this principle becomes necessary. It is true that when the motives of a trustee in the neglect of his duty are not essentially bad, or are readily reconcilable with ordinary honesty of purpose, certain courts have applied this rule leniently. \* \* \* It is true that weak toleration from the bench of frail, but penitent, humanity, has often apparently robbed the principle of its very life. But such precedents serve only to increase plausible devices for evading its consequences. They encourage the natural tendency of designing selfishness to substitute the vague expression 'business enterprise' for 'business honesty.'"

Transactions had by a director of a company with reference to the property of the company for any purpose, whereby the director obtains any profit, are looked upon by the courts with great suspicion; and, while they may not be invalid or void *per se*, yet they are voidable by the company or its stockholders if action is taken within a reasonable time. There is some difference in the opinions of courts of last resort as to whether or not such transactions can ever be sustained, some holding that the stockholders in all instances may have them set aside upon repayment to the directors of the consideration paid over by them. Others hold that such transactions may be maintained as valid if the directors show that the entire proceeding by which they were entered into was fair, open and aboveboard.

Taking the more favorable of these authorities, the burden has always been held to be upon the directors to show that the transaction was fair, in good faith, open and aboveboard. These general principles are recognized in Sections 2970-2981 of the Civil Code. Do the facts bring the defendant directors within these principles?

In the complaint in this case facts are alleged which distinctly show a profit to the directors redeeming, and the allegation is made that the acts of the directors whereby they acquired the property of the company were fraudulent. Defendants filed their answers, in which they specifically denied any fraudulent intent or actions, and alleged that all transactions were *bona fide* and fair.

It will be noticed that, upon the hearing of the case, none of the defendant directors except Timothy E. Collins was called as a witness. In fact, no other testimony was introduced in their behalf. Timothy E. Collins did not assume to testify as to the *bona fides* of the other directors. Upon the record, therefore, as it stands, there is no evidence given in any manner tending to show that the allegations of defendants John C. E. Barker, David L. S. Barker and J. T. Armington were truthful. They had every opportunity to prove the facts alleged in their answers, but they wholly neglected so to do.

While this court would not be authorized to draw as a conclusion, from this failure to prove, that the allegations of good faith in the answers were false, yet, inasmuch as these allegations in the answers were all denied by the replication, and as the burden of proof to maintain them was upon the several directors, and they introduced no evidence, this court is justified in holding that their acts were not in good faith and above-board.

The Montana Gold, Silver, Platinum & Tellurium Mining Company had title to some 13 mining claims, from which it had extracted large quantities of rich ore. After being in operation a few years, it became indebted in a sum of from \$12,000 to \$15,000. Its directors consisted of John C. E. Barker, David L. S. Barker, J. T. Armington, Timothy E. Collins and Frank Coombs. John C. E. Barker was president, and J. T. Armington secretary. Four out of these five directors are defendants in this action. The proof discloses that Coombs never acted as a director, except at one meeting, and that he never received notice of any subsequent meeting of the directors; that all trans-



actions in behalf of the company were carried on by the four directors who are defendants. The record discloses no attempt to borrow money to liquidate this indebtedness, which, according to the testimony of Timothy E. Collins, all arose under the management of these directors. No meeting of the stockholders was ever called to discuss ways and means to take care of it. The last stockholders' meeting was in June, 1897, when these directors were elected. Work by the company on the property was closed down in 1897 or 1898. The first judgment against the company on a portion of this indebtedness was entered in favor of the First National Bank of Great Falls some time in 1897 or 1898, the exact date not appearing in the record. Two other judgments soon followed. On the third judgment all the property of the company was levied upon and sold under execution. Other judgments were afterwards entered. No meeting of the directors or stockholders was held to devise ways and means for procuring the discharge of any of these judgments. None of the plaintiff stockholders were consulted in reference thereto, or asked to aid the company, by money or otherwise, to liquidate these obligations. All the judgments except the first had been obtained upon the acceptance of service of summons by John C. E. Barker as president of the company. The property was sold on the 3d day of March, 1898.

Collins testifies that after the sale he interviewed many of the stockholders, and advised them not to redeem. On the 28th day of February, 1899, two days prior to the expiration of the time for redemption, John C. E. Barker obtained a judgment against the company by default, based upon the acceptance of service of summons by J. T. Armington as secretary. The four defendant directors and stockholder E. J. Barker held an informal meeting at Willard's store, and concluded to redeem the property. The date of this meeting is not fixed definitely by the record, but was very shortly before the redemption was made. There was no formal meeting of the board of directors, and no notice was given to director Coombs of this meeting, nor any invitation extended to him to be present. No notice of any kind

was given to any of the plaintiff stockholders of the intention to redeem the property from the execution sale. There were no funds on hand belonging to the company with which to make the redemption. It was not sought to borrow money or to obtain it from the stockholders for this purpose.

Witness Collins detailed what was done at this informal meeting of the trustees prior to the redemption: "My impression is that the board of trustees had a meeting after the one mentioned in these minutes. I wouldn't say it was the meeting of the board of trustees. It was either a meeting of the board of trustees, or an informal meeting of three of the members of it. The meeting was held at Willard's store for the purpose of devising ways and means to clear the property of its indebtedness and redeeming it. \* \* \* We had a meeting a few days or a week, with these redemptioners, before the time for redemption; the purpose of the meeting being to determine whether or not we should redeem the property. We talked the matter over for a day or two, and concluded, after a great deal of consideration—the majority concluded that they would redeem. I didn't want to redeem. I wanted to abandon everything I had in the property, rather than to redeem. I didn't care a bit whether Mrs. Collins joined in the redemption. No; it was not arranged at this meeting who should redeem the property. The meeting was between J. C. E. Barker, D. L. S. Barker, J. T. Armington, E. J. Barker and myself, to determine whether we should redeem under the Barker judgment. After talking the matter over for a couple of days, those people concluded that they would put their money into it and redeem it. \* \* \* With reference to redeeming the property, I tried to tell you the details of that. We talked the matter over. We had a whole year in which to consider, and it looked as though we were not going to do it; but a short time before the redemption we got together and talked it over quite awhile, and at last it was agreed that it should be done. \* \* \* The meeting where it was arranged about redeeming the property was an informal meeting of the people there—of some who were officers and some who were not.

I don't think we met there as officers of the company. I wouldn't say so. Mr. Jenks Barker was in it, and he wasn't an officer of the company. I was an officer, Armington was an officer, and J. C. E. Barker was an officer. We were all directors of the company. \* \* \* This was not a meeting of the board with reference to the redemption of this property. There may have been casual meetings between two or three of us talking about the thing—no such formal meeting as that was. At the time of this meeting where we arranged to redeem the property, as I have testified, the intention was that the property should revert—should get away from the corporation in the hands of the individuals. The purpose of that meeting and the arrangement made was practically to take this property entirely away from the stockholders if they wouldn't put up in the time in which they had to do it in. They had no time to put up after that meeting—no time at all. They were not given any notice or opportunity to put [up] after that meeting, because that meeting was almost directly before the time for redemption. The purpose of all us people that were a party to the redemption was to redeem this property in the name of these individuals, and for their benefit, and not for the benefit of the company." Collins says that the property, in his judgment, was not worth more than \$5,000 to \$7,500, but, because of surrounding mines, its location, and the improvements upon the property, it might have been worth from \$12,000 to \$15,000; but on cross-examination he says: "This property at the time of redemption might have been worth \$50,000. I wouldn't say it wasn't worth \$100,000, or way in excess of that."

The redemption was effected by means of the John C. E. Barker judgment above mentioned, of which the judgment creditor, John C. E. Barker, assigned an undivided four-fifths interest to defendants David L. S. Barker, J. T. Armington, E. J. Barker and Lavina A. Collins, wife of defendant Timothy E. Collins. This redemption was made on March 2, 1899, by the payment of the amount bid on the judgment upon which the property had been sold, with interest; of the amount of the two

judgments prior to the one under which the property was sold, and interest thereon; and of the taxes then due. The deed was not issued until July, 1900, and was not delivered to the redemptioners until September, 1900, when it was recorded. By this deed the title to all the property of the company was vested in John C. E. Barker, David L. S. Barker, E. J. Barker, J. T. Armington and Lavina A. Collins. On March 23, 1899, the Big Snowy Mining Company was organized by J. T. Armington, David L. S. Barker, John C. E. Barker and E. J. Barker. Timothy E. Collins was made trustee for the first three months. The certificate of incorporation recites that Collins was subscriber for 1,000 shares of the stock.

The record discloses that from September 23, 1899, until some time in 1901, shipments of ore taken from the property were made, and the net results of such shipments amounted to \$96,781. These shipments, for the most part, were made in the name of the Big Snowy Mining Company, through David L. S. Barker, agent.

The record further discloses that, at a meeting of the directors held immediately after their organization as a board, it was voted to submit to the stockholders a proposition to lease any portion or all of the property. No such meeting of the stockholders is shown, but on July 17, 1897, a lease was signed by John C. E. Barker, as president, and J. T. Armington, as secretary, to George Moore, E. J. Barker and Spencer Rowley. The lease was for one year, but it was extended six months by John C. E. Barker, as president, and J. T. Armington, as secretary. It was recorded on the 19th day of January, 1898. Another lease was executed to E. J. Barker and one Fitzsimmons on a portion of the property of the company on the 28th day of December, 1897, for one year, also executed by John C. E. Barker, as president, and J. T. Armington, as secretary. This lease was recorded on the 14th day of January, 1898. Witness Collins testifies that certain leases were in existence at the time the redemption was made. After the redemption was effected, plaintiff Coombs talked with defendant Armington in regard to the

same, and suggested that he would probably lose his stock. Armington replied: "Your stock will be all right. You will get your stock all right"—leading Coombs to believe that the redemption had been made for, and in the interest of, the company. It also appears from the record that, immediately after the redemption had been completed, defendant John C. E. Barker caused to be published in a Great Falls paper the fact that the redemption was made for the company, and that all stockholders, upon paying their just, proportionate share of redemption, might still retain their interest in the property.

The record further discloses that defendant John C. E. Barker stated to several persons that, so far as he was concerned, the redemption might be treated as having been made for the company; and, so far as is disclosed by the record, none of the defendant directors ever stated to any one, until long after redemption, that they proposed to hold the property in their own interests, and adversely to the company. By this redemption the parties redeeming succeeded in obtaining the property from the company at an expenditure of a comparatively small sum, and in less than two years thereafter received from the smelting company, by which ores mined by or in behalf of the redemptioners were treated, \$96,781 in cash.

Counsel for defendant directors cite many cases to the proposition that under certain circumstances the directors of a corporation may become its creditors, and enforce their claims against the corporation as any other creditors. We have no inclination to dispute this doctrine, but agree with it, as being for the best interest of the corporation. This doctrine, however, is based upon a *contract relation* between the directors and the company whereby the debt is created, and is allowed because directors of a corporation are more familiar with the business and affairs of the corporation and its necessities than outsiders, and that it would be extremely unjust not to permit them to assist the corporation in financial troubles. When directors become creditors in this manner, they may enforce their claims by the same methods as any other creditor. It will be noticed,

however, that in all such cases the contract is viewed with distrust by the courts, and is subject to the strictest scrutiny, and may be enforced only when it is fair and equitable.

Counsel further cite numerous cases holding that a director may become a purchaser of corporation property at a judicial sale when such sale is made by another creditor, and when the director has no control over the proceedings. We also agree with this doctrine, subject to the qualification, however: That the acts of the director must be fair and honest, and he be not permitted to obtain any dishonest advantage over the corporation or stockholders.

Counsel also insist that a director may purchase property of the corporation from another purchaser at a judicial sale. This is really an application of the principles upon which the last above mentioned doctrine is based, and must be accepted only with the qualifications above noticed.

We are of the opinion that the facts of the present case do not bring it within either of the doctrines above announced. It cannot fall within the first, because of the absence of contract relation existing between director and corporation. It cannot fall within either of the others, because the directors did not become bidders at the sale, or purchase the right of a successful bidder. The latter would require a contract between the directors and bidder, which is entirely absent in this case. The directors here simply *redeemed* the property from a sale under the provisions of the statute. The purchasers are not shown to have consented to this redemption. It could have been made even as against their protest. It is also important to notice the method by which these directors acquired the right to become redemptioners. The redemption was made under a judgment rendered in favor of one of their number only two days before the redemption, which was obtained by default *based* upon the acceptance of service of the summons by another of their number. These facts render it too doubtful for this court to hold that the entire proceeding was open, aboveboard, fair and equitable.

No explanation is offered by any witness why the judgment of John C. E. Barker was obtained only two days before the time for redemption had expired. Neither is there any explanation offered as to why the summons was not served in the usual way upon the defendant corporation, or why notice of the pendency of the suit was not given to any one except the directors who took part in the redemption. There is too much opportunity for fraud under such circumstances to maintain them in absence of any explanation. The directors may have conspired among themselves to allow this judgment to be entered so short a time before the redemption, to take an assignment of the judgment and redeem the property to the utter exclusion of all the other stockholders. The manner of showing the *bona fides* of the transaction was, if such was the fact, clearly within the power of the directors. They sit by silently and say nothing, and this court, under the circumstances detailed, cannot say that their acts were *bona fide* and sufficient to maintain their position.

Counsel for defendants claim that there is no fraud in fact alleged against defendants in the complaint. Whether this is true, we deem immaterial. A breach of official duty on the part of the defendant directors is clearly alleged and relied upon. This is a fraud in law, and sufficient to warrant relief if proven. It is very difficult to distinguish the effect of fraud in fact from the effect of fraud in law. Usually the two classes concur in their effect. It is the same. This court has well said in the case of *Gerry v. Bismarck Bank*, 19 Mont. 191, 47 Pac. 810: "Appellants maintain that the lower court must have rendered its decision upon the theory that Bannister was guilty of constructive fraud,—fraud which the law would imply from any violation of his fiduciary relation as a trustee for the stockholders; and that, inasmuch as plaintiffs' complaint was wholly on the theory of actual fraud, relief cannot be afforded in the present suit for any disregard by Bannister of his fiduciary obligation as to profits. We do not disagree with the general principle that, even under our form of procedure, the proof must

substantially correspond with the allegations relied on for relief, and that a plaintiff cannot allege one cause of action, and then, even if the proofs might justify it, obtain relief on one which is essentially different in character. (See Pomeroy on Code Remedies, Sec. 553 *et seq.*) But does the complaint before us set forth different theories for recovery? We think not. It contains an averment of a fraudulent conspiracy, and the fiduciary relationship of Bannister and Child to the company is averred only as one of the means whereby the fraud was perpetrated. The latter averment supports the former. The two blend naturally into the gist of the action. Even if any line of demarcation could be preserved between the fraudulent conspiracy as one theory in this complaint, and the violation of the duties of the fiduciary relationship as another, still the two would not be essentially different. Fraud would be the basis of recovery in each."

Proof of either class of fraud is sufficient to warrant relief. Therefore allegations and proof of a breach of official duty are all that is necessary. (*Fulton v. Whitney*, 66 N. Y. 548; *Alaniz v. Casenave*, 91 Cal. 41, 27 Pac. 521; *Hoyle v. Plattsburgh & Montreal R. Co.*, 54 N. Y. 314, 13 Am. Rep. 595; *Morgan v. King*, 27 Colo. 539, 63 Pac. 416.)

Further citation of authority seems unnecessary. The entire subject is thoroughly and succinctly treated by Judge Thompson in 10 Cyc. 787 *et seq.*, where numerous authorities are cited.

It will be noticed that the allegations of the complaint as to defendants John C. E. Barker, David L. S. Barker and J. T. Armington are found to be true by the court in its findings of fact. Under the principles above laid down, and the findings of the court, we are clearly of the opinion that as to defendants John C. E. Barker, David L. S. Barker and J. T. Armington, plaintiffs are entitled to relief.

2. The court below by its findings concluded that Edwin J. Barker was a *bona fide* purchaser of an undivided one-fifth interest in said property by virtue of said redemption, and that he and his estate was a *bona fide* purchaser, without notice, of



an undivided one-fifth interest in said property by virtue of said redemption and sheriff's deed, and also concluded that said Lavina A. Collins was, by virtue of said redemption and sheriff's deed, a *bona fide* purchaser of an undivided one-fifth interest in said property, for a valuable consideration. In its conclusions of law the court also announced that the estate of E. J. Barker and Lavina A. Collins were *bona fide* purchasers, each of a one-fifth interest in said property, and were protected as such, and refused to enter any judgment or decree against them in favor of plaintiffs. In the answers of these defendants, it is alleged that they are *bona fide* purchasers, without notice.

The allegation of the joint answer of Timothy E. and Lavina A. Collins in that regard is as follows: "But they deny that the defendant Lavina A. Collins has not acquired any interest in and to said property, but allege that she has acquired, both in law and equity, an undivided one-fifth interest in and to said property; that she was an innocent purchaser thereof; that she has a good right, title and interest therein as against the plaintiffs herein and against the world." The answers of the representatives of the estate of E. J. Barker allege that all acts done by E. J. Barker and his grantor, John C. E. Barker, in the redemption of said property in their own behalf, were done in good faith and without fraud. But each of these defendants admits the allegations of the complaint as to the facts in regard to the redemption of the property. It will be noticed that defendant Lavina A. Collins does not plead that she is a *bona fide* purchaser for value, or that she paid anything for her interest in the property.

As above stated, Timothy E. Collins was the only witness who testified at the trial in behalf of the defendants. His testimony, as bearing upon the connection of Lavina A. Collins with the redemption of the property, is as follows: "My wife got the money to redeem from E. J. Barker, who advanced it to her. \* \* \* Since redemption she has received a check for one thousand dollars, but not any more than that. \* \* \* Mr. E. J. Barker represented her at the time the redemption was made.

\* \* \* Mrs. Collins got none of it [the amount of \$96,000, as testified to by witness Smith], and I think it is—this thousand dollars—is a part of that whole shipment, or her share of it, or I don't say her share; it was all she got out of it. Mrs. Collins' interest in the redemption is one-fifth. \* \* \* After talking the matter over for a couple of days, those people concluded they would put their money into it and redeem it. When I left I told them I didn't care about it, and Jenks Barker said, being as I was interested with him in a business way, that my wife should have an interest in it. I told him I didn't have any money, and she didn't have any, and he said he would put the money in for her—that on account of the business relations in the Big Seven. I have always been interested with these people. Yes; he wanted to keep me interested with them. My wife had an interest in the Big Seven. I represented her interest in the Big Seven, and our relations were close and intimate. My wife never had anything to do with these mining interests. Whatever was done, I attended to it personally. She never attended to those things. She was consulted. I told her about this before she went into this, and we made up our minds that, as she got a lot of money out of the Big Seven, she would take a chance—she would invest some money. She didn't have any money. So she didn't put up any. She paid the money afterward. She didn't pay the money out of the proceeds of the mine after it was redeemed. I was present when the money was paid on this account. It was in the month of February following the date of the redemption—January or February, 1900. This money was paid over in Helena to Mr. Jenks Barker. She hadn't gotten any money at all out of this property at this time. I think that it was in July, 1900, that she made them a payment. Yes; up to that time a great many thousand dollars had been realized out of that property for these different redemptioners. As I remember, it was about eight hundred dollars that she paid to Jenks Barker. That was her part of it. That's the way I remember it. She paid that, as I remember it, by check on the Montana National Bank on her own account. She got dividend

No. 1 out of this property after the redemption, and no more. I don't know when it was she got the thousand dollars. It was the time they paid their dividend, I suppose. It was a dividend signed by E. J. Barker, agent, or on account of D. L. S. Barker, agent. I presume he was agent for the redemptioners. That is the way he signed his check, I think. \* \* \* When this one thousand dollars was paid over, I knew it came from the proceeds of that group. Mrs. Collins received this thousand dollars at Helena. It was sent to her by mail by Mr. D. L. S. Barker. I didn't ask him anything about— Well, I did, too. I think I asked him two or three times to make a dividend, and after a while he declared a dividend, and sent my wife a thousand dollars. I had reason to believe they were getting money out of that, and I wanted my wife to have her share, and after waiting awhile they sent me this thousand dollars. I have tried ever since to get some more out of it, but I have failed so far. \* \* \*

\* I have deemed this property of sufficient value to defend this suit and prevent the property being turned back to the stockholders. I thought it was worth enough to justify me in doing that. \* \* \* My purpose now is to hold onto it. \* \* \*

Mrs. Collins acted on my advice in the matter. Her interest came really from Mr. Jenks Barker. Mr. Jenks Barker had control, and she could have been left out entirely if he wanted to. If it had not been for Jenks Barker putting her in as one of the redemptioners, I think she would have been left out entirely. Jenks Barker did that voluntarily and with my consent. Not a cent was put up at that time, except by Mr. Jenks Barker. He put up the money himself. No money was paid until July, 1901, on Mrs. Collins' interest. I told Mrs. Collins about it at the time she was let in on this redemption. That was after we had our talk. Jenks and I made all the talk, and I went up to Helena and told her about it. \* \* \*

It was a business proposition whether we should put up the money to go into it or not. We determined, after consultation over it, we would redeem it. After it was agreed that we should go in on it, and she to be one of the parties, I told her about it, and that's all she had to do

with it. The meeting where it was arranged about redeeming the property was an informal meeting of the people there—of some who were officers and some who were not. I don't think we met there as officers of the company. I wouldn't say so. Mr. Jenks Barker was in it, and he wasn't an officer of the company. I was an officer, Armington was an officer, and J. C. E. Barker was an officer. We were all directors but Jenks Barker, and I suppose he knew we were officers and directors of the company. I suppose everybody knew and all the stockholders knew who the officers of the company were. They could know. I don't know whether Mrs. Collins knew who the directors of the company were, and that I was a director. I think possibly. I don't know whether she did or not. She probably did. She ought to—all these years of my connection with it. I naturally think she knew I was an officer, and who the other officers were. I don't know. The three of us—J. C. E. Barker, Armington and myself—had the active management of the property all the time, and that was thoroughly known, and who were the officers of the company. \* \* \* I don't know whether I or my wife ever authorized D. L. S. Barker to act as our agent, but the Barkers have the majority. When the thing was working the Barkers had three interests and naturally D. L. S. Barker would be the one to represent the concern when they were working. Whether my wife authorized him, in writing or otherwise, to do it, I don't know; cannot call to mind. I do not remember if I myself ever authorized him to do anything. I may have; may not. I cannot tell. If it came up I did. I don't remember anything about it."

Taking the testimony of this witness as true, we are satisfied that defendant Lavina A. Collins was not a *bona fide* purchaser for value of any interest in the property in question. This testimony discloses that whatever money was necessary for Lavina A. Collins to redeem was paid by E. J. Barker. She was a mere volunteer in the transaction, and parted with no consideration at the time of the redemption. Witness Collins gives no testimony tending to show that Lavina A. Collins ever paid one cent

to John C. E. Barker for an undivided one-fifth interest in the judgment which he held against the mining company, through which the redemption was made. According to his testimony, she never paid E. J. Barker but \$800, and the date of this payment is quite uncertain. Witness first says that it was in January or February; again, that it was in July, 1900; and again, that it was in July, 1901. But at all events, \$800 was all she paid.

It is alleged in the complaint and admitted by the defendants that over \$6,000 was paid on the redemption. If defendant Lavina A. Collins was the owner of a one-fifth of the property redeemed, she should have paid one-fifth of the consideration, which is above the sum of \$1,200. According to the testimony of this witness, she received a dividend of \$1,000. The date when this was paid to her cannot be ascertained from the record. Witness, however, states that she did not pay the \$800 to E. J. Barker out of this money.

But, again, according to the testimony of this witness, Lavina A. Collins knew who were the members of the board of directors of the defendant mining company at the time of the redemption. Having such knowledge, she is charged with knowledge of the law that such directors could not redeem the property in their own names. This knowledge must be imputed to Lavina A. Collins, and yet we find her joining with the derelict directors in redeeming the property of the company for their own benefit.

But, again, E. J. Barker, according to the testimony of this witness, acted as Lavina A. Collins' agent in the redemption of the property. We find on examination of the record that he signed her name to the notice of redemption by himself as her agent. She is therefore charged with all knowledge that her agent, E. J. Barker, possessed. The testimony of Timothy E. Collins shows that E. J. Barker was present at the meeting of the trustees of the mining company when it was concluded to redeem the property. In fact, it appears generally from the record that E. J. Barker was the chief actor in the making of the redemption. Witness says that E. J. Barker knew who the

directors of the company were. And being present at the time the redemption was agreed upon, and taking part therein, and joining in the redemption in the manner as shown by the record, conclusively satisfies us that he should be charged with knowledge that the transaction was constructively fraudulent, and therefore he stands in no better position than the directors involved. (*San Francisco Water Co. v. Pattee*, 86 Cal. 623, 25 Pac. 135; *Lathrop v. Bampton*, 31 Cal. 17, 89 Am. Dec. 141; *Price v. Reeves*, 38 Cal. 457; *Hoffman Steam Coal Co. v. Cumberland Coal & Iron Co.*, 16 Md. 456, 77 Am. Dec. 311; *Cumberland Coal & Iron Co. v. Sherman*, 30 Barb. 553; *Fort v. First Baptist Church*, (Tex. Civ. App.) 55 S. W. 402; *Neal v. Bleckley*, 51 S. C. 506, 29 S. E. 249; *Roberts v. Moseley*, 64 Mo. 507.) He being the agent of Mrs. Collins in the redemption, she is charged with all the knowledge which he possessed. (Section 3112, Civil Code.)

Remembering that under these circumstances the burden was upon Lavina A. Collins to show that she was a *bona fide* purchaser, without any notice of the unlawful acts of the directors, and for a valuable consideration paid before she acquired such notice, we are not satisfied that she has met this burden with proper proof. We are therefore clearly of the opinion that the court below was in error when it found that defendants Lavina A. Collins and the estate of E. J. Barker were purchasers in good faith. The evidence does not justify such findings. We are therefore of the opinion that these findings should be set aside, and that defendants Lavina A. Collins and the estate of E. J. Barker should be held responsible to plaintiffs in exactly the same manner as the directors J. C. E. Barker, D. L. S. Barker and T. J. Armington.

3. As to the amount of the recovery to which plaintiffs are entitled: There is no doubt but that defendants are entitled to a credit for whatever money they have actually paid out or expended for the use and benefit of the defendant company—such as the money paid by them upon the redemption of the property, in satisfaction of *bona fide* claims against the prop-

erty, interest thereon at the rate of eight per cent per annum from the dates of payment, and also the reasonable expenses of extracting the ore taken from the property after redemption. The directors of the company, having the management of its business affairs, could have proceeded with the mining operations of the company and mined all this ore at the expense of the company. It is therefore inequitable to allow plaintiffs to recover the value of the ore after extraction, without allowing the defendants the necessary expenses of extraction.

As above noticed, the defendants John C. E. Barker, David L. S. Barker and J. T. Armington made a motion for a new trial, which the court granted in so far as to allow said defendants to introduce proof as to the amount of credit to which they are entitled for extracting the ore. It is very doubtful whether the court below could have granted a new trial for this purpose upon the showing made upon the motion, but this is an equity case, and this court believes it to be its duty to arrive at exact justice between the parties, as nearly as practicable, and to enforce the time-honored maxim, "He who seeks equity must do equity."

The case was evidently tried in the court below by defendants upon the theory that plaintiffs were not entitled to an accounting until after their liability was fixed in plaintiff's favor by order or decree of the court. True, an entire accounting might have been had at the trial, but was not, and it is impossible to do exact justice between the parties in regard to such accounting on the record before us.

We therefore advise that the decree of the lower court be reversed, and that the court be directed to enter a final decree dismissing the complaint as against defendant Timothy E. Collins, and in favor of plaintiffs against John C. E. Barker, David L. S. Barker, J. T. Armington, Lavina A. Collins, Marcella O'Leary as administratrix of the estate of E. J. Barker, deceased, and W. F. O'Leary as guardian *ad litem* of Edwin J. Barker, an infant; declaring and adjudging that the redemption of the company's property made by them or their predecessors

in interest was made for the benefit of defendant mining company, and that they hold the legal title to all of said property in trust for said company; that they reconvey the same to said company, and that said company's title thereto be quieted as against said defendants, and that defendants John C. E. Barker, David L. S. Barker, J. T. Armington, Lavina A. Collins, Marcella O'Leary as administratrix of the estate of E. J. Barker, deceased, and W. F. O'Leary as guardian *ad litem* of Edwin J. Barker, an infant, account to the said mining company, or to plaintiffs in its behalf, for the value of all ores extracted from said property since said redemption; that this accounting be in execution of this decree, and, when the amount is found due, the court enter the proper supplementary decree in favor of plaintiffs for the use and benefit of said defendant corporation.

PER CURIAM.—For the reasons stated in the foregoing opinion, it is ordered that the decree of the lower court be reversed, and that the court be directed to enter a final decree dismissing the complaint as against defendant Timothy E. Collins, and in favor of plaintiffs against John C. E. Barker, David L. S. Barker, J. T. Armington, Lavina A. Collins, Marcella O'Leary as administratrix of the estate of E. J. Barker, deceased, and W. F. O'Leary as guardian *ad litem* of Edwin J. Barker, an infant; declaring and adjudging that the redemption of the company's property made by them or their predecessors in interest was made for the benefit of defendant mining company, and that they hold the legal title to all of said property in trust for said company; that they reconvey the same to said company, and that said company's title thereto be quieted as against said defendants, and that defendants John C. E. Barker, David L. S. Barker, J. T. Armington, Lavina A. Collins, Marcella O'Leary as administratrix of the estate of E. J. Barker, deceased, and W. F. O'Leary as guardian *ad litem* of Edwin J. Barker, an infant, account to the said mining company, or to plaintiffs in its behalf, for the value of all ores extracted from said property since said redemption; that this accounting be in



execution of this decree, and, when the amount is found due, the court enter the proper supplementary decree in favor of plaintiffs for the use and benefit of said defendant corporation; and that each party to the foregoing appeals pay his own costs.

*Reversed and remanded.*

Rehearing denied February 7, 1905.

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McCONNELL ET AL., APPELLANTS, v. COMBINATION  
MINING & MILLING COMPANY,  
RESPONDENTS.

(No. 1,795.)

ON REHEARING.

(Submitted September 27, 1904. Decided January 21, 1905.)

(For former opinion, see 30 Mont. 239.)

*Corporations—Action Against Officers and Directors—Powers—Misappropriation of Funds—Items Chargeable—Ratification—Attorney's Fees—Traveling Expenses—Office Help—Mismanagement.*

Corporations—Directors—Stockholders—Estoppel—Ratification.

1. Where it does not affirmatively appear that plaintiff stockholders took part in a meeting or voted their stock, either in person or by proxy, they are not estopped to complain of an unauthorized act on the part of the directors alleged to have been ratified at such meeting.

Corporations—Stockholders—Removal of Office to Other State—Consent—Estoppel.

2. By agreeing to the unauthorized removal of the office of a corporation to a different city and state, stockholders did not estop themselves to complain of the wrongful use by the directors of the corporate funds after such removal.

Corporations—Directors—Unauthorized Levy of Assessment—Stockholders—Action.

3. The levy of an assessment by directors of a corporation without observance of the formalities required by law, and the threatened sale of stock

31	563
35	361

31	563
137	333

as delinquent, are of themselves sufficient to sustain an action by the stockholders against the directors.

**Complaint—Objection—Appeal.**

4. *Obiter*: An objection to a complaint, not made in the district court, will not be considered on appeal.

**Corporations—Directors—Relations to Stockholders.**

5. As to the stockholders of a corporation, the directors are trustees, besides being agents of the company and stockholders, and are not permitted to so deal with the trust property as to secure therefrom a profit to themselves.

**Corporations—Directors—Voting Themselves Salaries—Quorum.**

6. Directors cannot, even under a by-law authorizing it, vote a salary to one of their number, when the vote of such director is necessary to make up a quorum.

**Corporations—Stockholders' Meetings—Ratification of Officers' Acts Without Information Thereon—Effect.**

7. A resolution passed at a stockholders' meeting, called for the purpose of electing directors only, approving all the acts of the trustees and officers, is not a direct and substantive act on the part of the stockholders, done with the intention of ratifying the action of the board of trustees voting certain of their number salaries, when no statements are presented to the attending stockholders as to the condition of the company, and when it does not appear that they had been informed of the payment of such salaries.

**Corporations—Money Paid to Directors as Attorney's Fees—To Whom Chargeable.**

8. In an action against the officers and directors of a corporation for fraudulent misappropriation of corporate funds, the fact that sums of money were paid to the president and vice-president and charged up to the corporation as attorney's fees, neither the president nor vice-president being an attorney and no employment as such by the company having been shown, is not conclusive, and the items should be charged against defendants or not, upon proof of the real purpose for which they were expended.

**Corporations—Officers—Stockholders' Meetings—Expenses—Chargeable to Whom.**

9. The expenses of the president and vice-president of a corporation in attending stockholders' meetings and in visiting directors are not *prima facie* proper charges against the company.

**Corporations—Political Expenses—To Whom Chargeable.**

10. Expenses of lobbying a bill through the legislature, incurred by directors of a corporation, are not proper charges against the company, and the non-assenting stockholders are entitled to have the directors account to the corporation for money so expended.

**Corporations—Power of Directors to Incur Necessary Office Expenses.**

11. It is within the power of directors of a corporation to employ a secretary and pay him a salary, and to incur necessary expenses for offices and office help; but expenses charged by the directors as having been incurred for such purposes during the time when the corporation was not engaged in active operations should be explained.

**Corporations—Action Against Officers by Minority Stockholders—Expenses—To Whom Chargeable.**

12. Directors of a corporation cannot charge to the corporation expenses incurred by them in defending a suit brought by minority stockholders against them for a fraudulent misappropriation of the company's funds, although the company is made a nominal defendant.

**Corporations—Mismanagement by Employees—Loss—To Whom Chargeable.**

13. Loss occasioned by the mismanagement of an employe of a corporation or by a natural shrinkage in the value of supplies is not *prima facie* chargeable to the directors, unless it is apparent that they knowingly and willfully allowed the employe to pursue a course of action with reference to the

business from which resulting loss would be equivalent to misappropriation of the assets of the company.

**Corporations—Directors—Not Insurers or Guarantors of Success or Profit.**

14. Directors of a corporation are not insurers of the corporate property, nor guarantors that the enterprise undertaken by the corporation shall be successful and profitable.

**Corporations—Directors—Power to Incur Proper Office Expenses.**

15. Directors of a corporation are *prima facie* empowered to maintain an office at the place designated in the charter for the principal office of the corporation, and a rent charge occasioned for that purpose, so far as reasonable, may be charged against the corporation.

**Corporations — Directors — Power to Borrow Money—Assessments—Current Charges.**

16. It is the duty of directors of a corporation to obtain money to pay current charges, either by borrowing the necessary funds or by levying assessments upon the stockholders, and the obligation of the corporation to repay money borrowed by the directors is not affected by the fraudulent diversion of part of the money by the directors, even though some of the requirements of the by-laws, as to the execution of evidences of indebtedness, were not strictly complied with.

**Corporate Notes—Directors—Fraud—Action—Banks—Necessary Parties.**

17. Corporate notes executed by the directors to a bank cannot be set aside for fraud or any other reason, in an action by stockholders against the directors to which the bank has not been made a party.

**Judgment for President Against Corporation—Proper Charge—When.**

18. A judgment obtained by the president of a corporation against the corporation for money expended by him for it, is a charge against it, to be satisfied out of the assets of the company, after such officer has accounted for funds misappropriated by him as president.

MR. CHIEF JUSTICE BRANTLY delivered the opinion of the court.

It is not necessary to restate the facts of this case. The statement preceding the opinion delivered on the former hearing (30 Mont. 239, 76 Pac. 194) is entirely sufficient to meet present requirements, except certain inaccuracies therein to which attention is called before taking up a discussion of the merits. In that statement it is said that "the mines of the company were operated until June or August, 1893, when they were closed down and remained closed until June, 1895, when operations were resumed," etc. In fact, they were closed down until January, 1895. It would not be important to notice this inaccuracy but for the fact that it might mislead the trial court in taking the account which will be hereafter directed. The error was induced by a like error in the statement of facts in respondents' brief. Further along in the statement it is also said that the records of the company from July 6, 1892, the date at which

the company's office was removed to St. Louis, until October, 1898, when it was reopened in Butte, are in a somewhat chaotic condition. This is not justified by the facts appearing in the record, except so far as it applies to the records of the stockholders' meetings. The books of the company, except in this particular, seem to have been properly kept. All of the records were kept by the secretary or acting secretary, as is the rule with such companies. It was not necessary for the treasurer to keep separate accounts of his receipts and disbursements. The items of these properly appear in the books of accounts kept by the secretary, and this seems to have been the mode pursued throughout the history of this company.

After a re-examination of the record and the questions arising thereon in the light of the argument presented by counsel at the rehearing, we are content, except as appears hereafter, to let the case rest upon the conclusions stated in the former opinion. At the hearing much stress was laid upon the fact that the complaining stockholders had expressly authorized the removal of the office of the company from the city of Butte to St. Louis, Missouri, by resolution passed at the meeting in Butte on June 27, 1892, and the contention was made that by this action they estopped themselves from making complaint that the office was thereafter kept by the directors in St. Louis, even though this was not authorized by law. It might be conceded that this contention could be successfully maintained as to the other plaintiffs; yet, so far as this record shows, it does not affirmatively appear that the plaintiffs Thompson and Merrill took part in that meeting, or that they voted their stock, either in person or by proxy. But, further than this, if all of the plaintiffs had agreed to a removal of the office to St. Louis, and had thus estopped themselves to complain that it was kept there to their injury, they did not thereby agree that the funds of the company should be diverted from their appropriate uses; and, in so far as wrong was committed by the defendant directors in this regard, all the plaintiffs are in position to complain, and to have the offending directors brought to book. That they may

maintain this suit for this purpose is too well settled to permit of further argument, as appears from the authorities cited in the first paragraph of the former opinion.

Again, the levy by the directors of the assessment complained of, without observance of the formalities required by law as to notice, etc., and the threatened sale of the plaintiffs' stock as delinquent, is of itself sufficient to sustain the action. The complaint is not drawn after the most approved model, and might, perhaps, have been open to the objection that different causes of action are jumbled therein. Yet no such objection was made in the district court, and, if made here, would not be considered.

The only questions deserving further consideration arise touching the items with which the defendant directors should be charged. It is clear, under the authorities cited and discussed in the opinion, that the directors of a corporation have no power to vote salaries to themselves, as was done by the defendants. Four of them adopted by-laws providing for these salaries, and then voted three of their number salaries, who thereafter and until the bringing of this action drew them regularly, whether the company was engaged in active operations or not. Their good faith in doing this is altogether immaterial. The law characterizes such action as fraudulent. As to the stockholders, the directors are trustees, besides being agents of the company and stockholders, and may not be permitted to so deal with the trust property as to secure therefrom a profit to themselves. (*MacGinniss v. Boston & Mont. Con. C. & S. M. Co.*, 29 Mont. 428, 75 Pac. 89; *Gerry v. Bismarck Bank*, 19 Mont. 191, 47 Pac. 810; *Coombs v. Barker*, 31 Mont. 526, 79 Pac. 1.)

In *Gerry v. Bismarck Bank*, after commenting upon the argument of counsel made in an attempt to draw a distinction in legal effect between actual fraud of the trustees of a banking corporation and a violation of their fiduciary obligations as showing constructive fraud only, this court said, through Mr. Justice Buck: "That a trustee should not be allowed to profit by his trust is a well-known fundamental doctrine of equity. No evasions, no technical subtlety of reasoning, no empty distinctions

should be tolerated when the assertion of this principle becomes necessary. It is true that when the motives of a trustee in the neglect of his duty are not essentially bad, or are readily reconcilable with ordinary honesty of purpose, certain courts have applied this rule leniently. It is true that, when no patently willful violation of duty appears, many judges have shown a disposition to check its force. It is true that weak toleration from the bench of frail, but penitent, humanity, has often apparently robbed the principle of its very life. But such precedents serve only to increase plausible devices for evading its consequences. They encourage the natural tendency of designing selfishness to substitute the vague expression 'business enterprise' for 'business honesty.' "

The directors had power to adopt a code of by-laws (Comp. Statutes 1887, Div. 5, Sec. 454) ; but they could not, even under a by-law, vote a salary to one of their number, when the vote of such director was necessary to make up a quorum. Under the application of this principle it makes no difference whether the trustees intended to defraud the company and the stockholders of the amount of money appropriated for the purpose of paying their salaries, or whether they acted in the utmost good faith. The result is exactly the same; and, whether the recovery of the plaintiffs be put upon the ground of actual or constructive fraud, they are nevertheless entitled to recover upon the facts shown in this record.

These remarks apply to the items of \$14,374.78, paid to Chas. D. McClure as president; to the item of \$1,038.15, paid to Vice President Fusz for his salary; to the item of \$2,010.28, paid to Treasurer Moses Rumsey for his salary as treasurer and acting president; and to the item of \$50, paid Ewing for auditing the books. These items are chargeable to the defendant directors. A portion of these sums was paid out for services never rendered, because the salaries were fixed by resolution of the board on February 25, 1893, which made the salaries payable from the 1st day of January of that year.

It is true that at the meeting of the board of directors held in

Butte, Montana, on October 27, 1898, the directors themselves undertook to ratify their own action in fixing and paying these salaries; but the record shows that there were present at that meeting directors Ewing, Fusz, L. M. Rumsey, Williams and one Merrill. Williams did not vote. Fusz was one of the officers to whom a salary had been voted at the St. Louis meeting in 1892. The resolution passed at that time could not be held to be a ratification of the action of the board in paying the salaries, unless it be conceded that Ewing, Rumsey and Merrill were a majority of the seven directors, or were entitled to count Williams' vote in favor of the resolution.

Nor can it be maintained that the resolution passed at the various stockholders' meetings amounts to a ratification of the action of the board of trustees, when the meetings were called, not for that purpose, but for the purpose of electing directors only, and no statements were presented to the stockholders as to the condition of the company, or as to what business had been transacted by them during the year. So far as the record shows, the stockholders were not informed as to the payment of these salaries by the board of directors, and the resolution itself, which is set out in the sixth paragraph of the former opinion, was not a direct and substantive act on the part of the stockholders, done with the intention to ratify the action of the board.

A principal cannot ratify an unauthorized act of his agent about which he knows nothing, and as to all those acts done by an agent beyond the scope of his authority the principal is not bound to know anything, and he cannot ratify them until they are brought specifically to his attention. The same principle applies to the relations of the directors of a corporation to their stockholders in matters which must be authorized or ratified by action on the part of the stockholders.

We held in the former opinion that, because of the condition of the records of the stockholders' meetings subsequent to the removal of the office to the city of St. Louis, they were not admissible as evidence tending to show a ratification; but, whether

admissible or not, the result is the same, for the reasons just stated.

It must not be overlooked, however, that the whole amount for which Ewing is charged, and a portion of the amounts for which M. Rumsey and Fusz are charged, were represented by checks drawn for them, respectively, but never cashed. If it should appear on the accounting that these checks have never been delivered or paid, the defendants will be entitled to a credit for these respective amounts.

Touching the items paid out as attorney's fees, viz., \$500 paid to President McClure and \$400 paid to Vice President Fusz, the evidence of these two directors is vague and indefinite. If these sums of money were actually spent for the benefit of the company in the making of salt contracts and in the investigation of methods for the reduction of ores, they are proper charges against the company. President McClure testified that he was of the impression that the \$500 had been spent by him in connection with salt contracts; and touching the \$400 Vice President Fusz testified that his recollection was that the \$400 was spent in the investigation of methods for reducing ores. It should appear definitely and clearly for what purposes these expenditures were made. The president and vice president of a corporation, not being attorneys at law, and not showing any employment by the company to perform legal services, cannot charge the company for any sums of money under the guise of attorney's fees. The fact that these items are charged as attorney's fees, however, is not conclusive, and they should be charged or not upon proof of the real purpose for which they were expended.

Touching the \$75 paid to President McClure for expenses of attending stockholders' meeting, and \$73.20 paid to Vice President Fusz for visiting directors in Montana, it may be said in brief that *prima facie* these are not proper charges against the company. Neither the president nor the vice president is entitled to collect for expenses in attending stockholders' meetings or in visiting the directors. Stockholders may attend stock-



holders' meetings or not, as they please. They may vote by proxy, and thus avoid expense. Expenses attendant upon stockholders' meetings, so far as stockholders are concerned, are necessarily chargeable to the stockholders themselves. As a matter of fact there was no meeting of the directors in Montana, so far as the record shows, during the year 1896. If Vice President Fusz cared to visit the individual directors in Montana, it was certainly his duty to pay his own expenses.

The item of \$700 paid to Lewis S. McClure as an attorney's fee was a diversion of this amount of money from the purposes of the corporation to a purpose wholly outside of the range of its legitimate purposes. The testimony shows that it was a contribution to a political movement; nothing more, nothing less. The remarks upon this item in the former opinion are in point, and it is not necessary to enlarge upon them. This item should be charged to the directors, unless it be shown that it was authorized by the stockholders. The same may be said of the item of \$562.55. In plain language, this was paid out as the company's portion of the expense of lobbying a bill through the legislature—a purpose wholly foreign to those of a mining corporation—and the stockholders who did not assent thereto are certainly entitled to have the directors account to the company for the same.

The items of \$7,760.01, salary of secretary, \$1,089.85 for office boys, etc., \$595.20 for telephone, and \$2,147.94 for office supplies, etc., are such expenses as might have been incurred by the board of directors in the performance of their ordinary duties. It was within their power to employ a secretary, and to pay him a salary. It was also within their power to incur the necessary expenses for an office and for help in connection with it. It is a proper inquiry, however, as to whether or not it was necessary to have a secretary during those periods when the company was not engaged in active operations, and when there was no work for a secretary to do. When the accounting is taken, the district court should hear testimony, if the plaintiffs desire, to determine whether or not the item of \$7,760.01, paid

to Jesse B. Mellor, was reasonable, under all the circumstances, and the directors should be charged with so much of it only as appears to be an unnecessary and unreasonable charge against the company. This remark disposes of the items: "Office boys at St. Louis," \$1,089.85; for telephone, \$595.20; and for office supplies, etc., \$2,147.94. It seems, *prima facie*, unnecessary and unreasonable that any portion of these large bills of expense should have been incurred during many months while the company was not engaged in mining operations. The fact that during the time Secretary Mellor was receiving his salary he was employed as private secretary of McClure, does not of itself reflect light upon the reasonableness of the salary paid him by the company. It would become important only upon a showing that the services rendered to McClure personally were in fact paid for out of the company's funds, and that his ostensible employment by the company was for the personal benefit of McClure. Our attention has not been called to any evidence on this point.

The item of \$1,056.65, charged upon the books in favor of Paul A. Fusz, C. T. Rhoades, Boyd Bros. and W. J. Schofield for expenses of this suit, should not be allowed in favor of the defendant directors. In this case we have the plaintiffs complaining of these directors for the diversion of funds of the company to unlawful purposes. The company was made a defendant because it could not be plaintiff. This suit is on behalf of the company. It would certainly seem to be a travesty upon justice that the company should be compelled to pay the expenses of a suit brought by minority stockholders for the purpose of restoring delinquent trustees to a proper sense of their duties. The expenses of this suit became necessary through their wrongful action. They have resisted it, and this expense was incurred for the purpose of enabling them to make good their defense against the complaining stockholders. Under such circumstances this item should be charged to the defendant directors.

No complaint is made in the pleadings as to the item of \$5.-

076, "inexplicable shortages." Nor does the evidence throw any light upon it. There is a suggestion in the testimony of one of the witnesses that it might be the result of mismanagement on the part of the company storekeeper, or owing to a natural shrinkage in value of supplies. If it resulted from either of these causes, it would not, *prima facie*, be chargeable to the directors. The mismanagement of an employe of the company does not necessarily charge the directors for any loss occasioned thereby, unless it is apparent that they knowingly and willfully allowed such employe to pursue a course of action with reference to the business from which resulting loss would be equivalent to misappropriation of the assets of the company. The directors, when acting within the scope of their authority, are bound only to the exercise of good faith and the use of their best judgment in the conduct of the business. They cannot be held liable for mere mismanagement on the part of the employes of the company. Their duties do not make them insurers of the property of the company, nor guarantors that the enterprise undertaken by the corporation shall be successful and profitable. Upon the record it cannot be determined whether the directors were at fault with reference to this item.

*Prima facie* the directors were empowered to maintain an office at Butte after they were ordered to return the records to the state of Montana. That was the place designated in the charter for the principal office. The charge of \$180 per month for this purpose, except so far as it may appear to have been unreasonable and unnecessary, is a proper charge, and they may not be held to account for it. It appears that this expense was soon stopped by a removal of the office to Granite county, whereupon it became wholly unnecessary.

No contention whatever was made in the district court concerning the supplies on hand and the diamond drill. These items are not mentioned in the pleadings among the specific charges of misappropriation, and they are mentioned only incidentally in the evidence. It seems to have been assumed that they were not at all within the purview of the controversy.

Under these circumstances we shall not venture an opinion with reference to them. Nor was any complaint made touching the silver bullion withdrawn from the bank. Indeed, it appears incidentally that it was sold, and the proceeds accounted for.

The most serious question arises upon the contention of the parties with reference to the conduct of the directors in permitting the judgments to be taken against the company in the United States Circuit Court for the District of Montana in favor of the National Bank of St. Louis and Charles D. McClure, the president. These were for \$29,903.06 and \$9,583.30, respectively. They were rendered in actions brought by the plaintiffs during the pendency of this action, and were for moneys borrowed by the directors for the use of the company, and actually expended in its behalf. The claim of the bank was based upon two promissory notes—one payable to itself, from the defendant company for \$3,500, with accrued interest; and the other for the sum of \$18,000, with accrued interest, due and payable from the defendant company to the State Bank of St. Louis, and by it transferred to the plaintiff bank. The former of these was executed after the commencement of this action for moneys obtained by the directors to pay taxes, insurance and other current expenses of the company. The latter was a renewal of two notes for \$10,000 each, after certain payments had been made thereon, executed in December, 1896, and March, 1897, for moneys obtained for a like purpose. Doubtless some of these funds were used to pay salaries also, though this appears only by inference. The claim of McClure was for money advanced to the company to repay to stockholders the assessment made upon the stock of the company, to enjoin the collection of which was one of the purposes of this action. Certain of the stockholders had paid their share of it without complaint. But when this action was brought the assessment was declared void for want of legal notice. Thereupon McClure advanced the money to repay the stockholders, the funds derived from their payments having been expended for other purposes, conceived by the directors to be legitimate.

During the period, as a whole, between June 27, 1892, and the date of the institution of this action, the company's business did not result in profit. Sometimes there was a surplus; generally there was none. After the operations was finally closed in February, 1897, there was no income. Indeed, on March 4th of that year there had been contracted an interest-bearing debt of \$20,000, consisting of the two \$10,000 notes referred to above. The whole of these funds thus obtained, so far as we can judge, except the portion expended to pay the last item of expense, namely, the salaries, and perhaps the expense of keeping an office in St. Louis, were devoted to legitimate purposes of the company. It was the manifest duty of the directors to obtain money to pay these current charges, either by borrowing or by levying an assessment upon the stockholders. Their devotion of a part of the funds borrowed to unlawful purposes did not affect the obligations of the company to the banks, even though it be conceded that the requirements of the by-laws as to the execution of the notes were not strictly observed. The company obtained the money and used it. The bank was entitled to have its demands satisfied; and, even after this action was begun, the current expenses continued, except that the payment of salaries ceased, and moneys borrowed to pay them were charged against the company. Under the circumstances the directors could not resist the collection of the demand by the bank, even though it was done by the sale of property belonging to the company. The bank's judgment is now satisfied. But, if it were not, it would be impossible to investigate it in this proceeding, and set it aside for fraud or any other reason, because, if for no other reason, the bank is not a party to this suit. If the property of the company, however, was thus sacrificed, and the plaintiffs suffered loss, this would probably furnish an additional ground for relief against the defendant directors. But such ground of relief was not contemplated by the pleadings in this case, nor agitated in the proof on the trial.

So far as the judgment of McClure is concerned, it also stands as a charge against the company, to be satisfied out of any assets

belonging to the company after he and his codefendants have accounted for the funds misappropriated by them; for it would be manifestly wrong to compel him to account to the company with his codefendants for the misappropriated moneys, and then leave him without any means for reimbursement. This would be tantamount to compelling him to make a double return to the company for his wrong. The money collected by the company upon the unlawful assessment was devoted to the purposes of the company. Having been unlawfully collected, it became a debt from the company to the stockholders who had paid it. After he had discharged his duty to the company, it should in turn discharge its duty to him, thus reimbursing the outlay made by him.

The judgment and order denying a new trial are reversed, and the cause is remanded to the district court, with directions to take an account of all moneys wrongfully paid out by the defendant directors, and to charge them therewith, together with interest thereon at the legal rate upon each item, from the date of its misappropriation until the date of the account, and to render a judgment against them for the amount so found due. For this purpose the court should hear such other testimony as may be necessary to take the account in accordance with the suggestions herein contained.

*Reversed and remanded.*

MR. JUSTICE MILBURN and MR. JUSTICE HOLLOWAY concur.

## CHESSMAN, APPELLANT, v. HALE, RESPONDENT.

(No. 1,968.)

(Submitted October 20, 1904. Decided January 21, 1905.)

31	577
32	203

31	577
39	379

31	577
41	572

*Water Rights—Nuisances—Fouling of Streams—User—Right of Trial by Jury—Waiver—Mode — Instructions—Exceptions.***Water Rights—Placer Mining—Pollution of Stream—Injury to Land.**

1. Under Civil Code, Sections 1880 and 4605, an appropriator of an upper water right who, in a contract to deliver it to a lower owner of land at a certain place, has reserved to himself the right to use the water for placer mining purposes, acquires no title to the water itself, or any right to pollute the water to any greater extent than is permitted by law; and, while he has a right to a reasonable use of the water for the purposes specified, although such use does result in fouling it to some extent, yet he cannot cover the lower proprietor's land with mining debris, so as to render it valueless.

**Water Rights—Prescription—Requisites.**

2. In order to obtain a right by prescription, it is necessary that during the prescriptive period an action could have been maintained by the party against whom the claim is made.

**Water Rights—Prescription—Limitations.**

3. A right by prescription is limited by the character and extent of the user during the period requisite to acquire the right.

**Water Rights—Use—Placer Mining—Nuisances.**

4. The use of water by an upper appropriator in such a way as to carry sand, gravel and mining debris over the land of a lower proprietor, so as to render it valueless, constitutes a nuisance, both at common law, and under Civil Code, Section 4550, and Code of Civil Procedure, Section 1300.

**Nuisances—Action for Damages—Right of Jury Trial.**

5. Under the Constitution of the United States, Seventh Amendment, in force at the time of the adoption of the Constitution of Montana, and under Article III, Section 23, of the Constitution of Montana, and Code of Civil Procedure, Section 1300, and Civil Code, Sections 4550, 4555 and 4590, plaintiff in an action for damages for the maintenance of a nuisance is entitled to a trial by jury of his right to damages, although he also asks for the equitable relief of injunction to restrain the continuance of the acts complained of.

**Nuisances—Action for Damages—Jury Trial—How Waived.**

6. Under Constitution, Article III, Sections 23 and 29, and Code of Civil Procedure, Section 1110, prescribing the manner in which a jury in a civil case may be waived, plaintiff's right to a jury trial in an action for damages for a nuisance could only be waived in one of the modes specified, and was not waived by his failure to demand a trial by jury, or to submit to the court the question as to whether he had a right to a jury trial, or by endeavoring to maintain his claim under the theory of the case which the court, by its ruling that it was an action in equity, compelled him to adopt.

**Refusal of Instruction—Reason Given by Court—Exceptions—Waiver.**

7. It is not necessary to take an exception to the reason given by the trial

court for refusing an instruction, and by proceeding with the trial after such refusal a party does not waive his exception, but the action of the court is deemed excepted to under Code of Civil Procedure, Section 1080, as amended by Session Laws of 1901, page 160.

*Appeal from District Court, Lewis and Clarke County;  
Henry C. Smith, Judge.*

ACTION by William A. Chessman against Robert S. Hale for damages to plaintiff's land caused by defendant discharging mining tailings and debris upon said land, and for an injunction. From a judgment for defendant, and from an order denying a new trial, plaintiff appeals. Reversed.

*Mr. William Wallace, Jr., for Respondent.*

Any right or privilege conferred by statute or even by Constitution may be waived, save in matters involving the public interest. (28 Ency. Law, 1st Ed., 535; *Mehlin v. Ice*, 56 Fed. 12-20; *Beecher v. Marq. R. M. Co.*, 45 Mich. 108; *Shutte v. Thompson*, 15 Wall. 159; *Ferguson v. Landram*, 5 Bush. 230, 96 Am. Dec. 350; Sec. 4604, Civil Code.) Right of trial by jury may be waived in all cases, save those punishable capitally. (*Basey v. Gallagher*, 20 Wall. 670.) The court submitted only special issues to the jury, and, on the theory on which this case was tried by all the parties, only special issues could have been submitted to the jury and a general verdict would have been improper. (*Duff v. Moran*, 12 Nev. 94; *Wingate v. Ferris*, 50 Cal. 105; *Brandt v. Wheaton*, 52 Cal. 434; *Warring v. Frear*, 64 Cal. 54, 28 Pac. 115; Hayne on New Trials and Appeal, Sec. 234.)

Plaintiff having moved the court to reject certain of the jury's findings and make additional findings of its own, a conclusive presumption is created that plaintiff sought such action. (2 Ency. Pl. and Pr. 436; Hayne on New Trials, Sec. 285, pp. 844-5-6; *Livermore v. Webb*, 56 Cal. 592; *Lyons v. Roach*, 84 Cal. 27, 23 Pac. 1026; *Sichler v. Look*, 93 Cal. 606, 29 Pac. 221; *Hahn v. Matthai*, 115 Cal. 692, 47 Pac. 699.)



Having urged the court below to treat the findings of the jury as advisory merely, plaintiff cannot now, because dissatisfied with the result, reverse his position in this court. (*Harris v. Lloyd*, 11 Mont. 390, 28 Pac. 737, 738; *Newell v. Meyendorf*, 9 Mont. 254, 23 Pac. 333; *Forrester v. B. & M. Co.*, (Mont.) 74 Pac. 1089; *Davis v. Wakely*, 156 U. S. 680; *Michels v. Olmstead*, 157 U. S. 198; *Lewis v. Wilson*, 151 U. S. 551; *McConihay v. Wright*, 121 U. S. 201; *Reynolds v. Fitzpatrick*, 28 Mont. 175-7; Secs. 4603, 4604, 4607, Civil Code; *Sichler v. Look*, 93 Cal. 606, *supra*; *People v. Mellon*, 40 Cal. 648-655; *Dahler v. Steele*, 1 Mont. 208; *Stafford v. Hornbuckle*, 3 Mont. 489; *Rooney v. Tong*, 4 Mont. 600, 2 Pac. 312; *Martin v. Maxey*, 14 Mont. 86, 35 Pac. 667; *Ogburn v. Connor*, 46 Cal. 353; Hayne on New Trial, Sec. 285, p. 846.) Had plaintiff desired a general verdict, he should have demanded it, and excepted if it were not submitted. (*Harris v. Lloyd*, 11 Mont. 399, 28 Pac. 736; *Evans v. Ross*, 8 Pac. 88-9; Elliott's Gen. Pr. Sec. 919; *Woolman v. Garringer*, 2 Mont. 407.)

It was unnecessary as to nuisance or trespass to first establish them at law. (*M. O. P. Co. v. B. & M. Co.*, (Mont.) 70 Pac. 1121; 1 Ency. Law, 2d Ed., p. 66, note 2 and many cases.)

Where legal and equitable issues are united and a demand is made for a jury trial of the issues without specifying any particular issue, a jury is properly refused. (6 Am. and Eng. Ency. Law, 2d Ed., 975, note, citing *Greenleaf v. Agen*, 30 Minn. 316; *Lindley v. Sullivan*, 133 Ind. 588; *Pedens v. Cabins*, 134 Ind. 194; *Lace v. Fixon*, 39 Minn. 46.) Had there been no prayer for damages and the action been for an injunction only, the court might have tried it itself, or, calling a jury, treated its verdict as advisory. (*Basey v. Gallagher*, 1 Mont. 456; 20 Wallace, 515; *Fabian v. Collins*, 3 Mont. 226; *Mantle v. Noyes*, 5 Mont. 277, 5 Pac. 860; *Clark v. Baker*, 6 Mont. 158, 9 Pac. 911; *Beck v. Beck*, 6 Mont. 318, 12 Pac. 694; *Kleinschmidt v. Greiser*, 14 Mont. 494, 37 Pac. 3; *Zickler v. Deegan*, 16 Mont. 494, 40 Pac. 412; *Sanford v.*

*Gates*, 21 Mont. 286, 53 Pac. 752; *M. O. P. Co. v. B. & M. Co.*, 70 Pac. 1121.)

Where legal and equitable issues are involved they must be separately tried, and the equitable issues should always be tried first, for the reason that the determination of the equitable issues may make it entirely unnecessary to try the whole issue. (*Lestrade v. Brath*, 10 Cal. 671; *Hauser v. Austin*, 10 Pac. 40, and cases cited; *Duff v. Fisher*, 15 Cal. 379, cited in note to Sec. 1034, Code of Civil Procedure of Montana.) The contract was an equitable defense even to the damage feature of the action. (*Coffman v. Robbins*, 8 Ore. 284; *Wright v. Schindler*, 21 Pac. 196; *Reece v. Rousch*, 2 Mont. 590; 7 Ency. Pl. and Pr. 807-808; *Lacey v. Johnson*, 17 N. W. 249; *Alexander v. Winters*, 49 Pac. 115; *Fabian v. Collins*, 3 Mont. 230.) If plaintiff, without right of appropriation in clear waters in the gulch, simply turned the water charged with tailings from the natural channel on his own land, he cannot recover, for there is no injury done any right of his. (*Platte V. I. Co. v. Buckers I. Co.*, 53 Pac. 335; *Crowder v. McDonald*, 54 Pac. 45; *Baxter v. Gilbert*, 125 Cal. 580; *Ball v. Kaehl*, 95 Cal. 613; *Stone v. Bumpus*, 40 Cal. 428-432.)

There is no attempt in this contract or deed to limit the volume of tailings to be borne in the water. Such contracts have always been upheld and would control the rights of plaintiff, even had he been a prior appropriator of natural waters of the gulch before the contract was made. (*Fabian v. Collins*, 3 Mont. 215; *Smith v. Hope Mining Co.*, 18 Mont. 432; *Coffman v. Robbins*, 8 Ore. 278-284; *Baldock v. Atwood*, 21 Ore. 73, 26 Pac. 1058; *Wright v. Schindler*, 21 Pac. 195; *Chicosa Irr. Co. v. El Moro Co.*, 50 Pac. 731; *Alexander v. Winters*, 49 Pac. 116.)

*Mr. M. S. Gunn*, for Appellant.

A court of equity will not ordinarily grant relief against a nuisance until the fact of the nuisance has been established by

a trial by jury in a court of law. (*Carlisle v. Cooper*, 21 N. J. Eq. 576; *Oswald v. Wolf*, 21 N. E. 839; 2 Story's Eq. Jur. Secs. 925, 925b; 1 Spelling on Injunctions, 2d Ed., Sec. 377; 3 Pomeroy's Eq. Jur. Sec. 1350; *Stadler v. Grieben*, 61 Wis. 500, 504; *Bemis v. Clark*, 11 Pick. 454; Wood on Nuisances, Sec. 843; *Kotenberthal v. City of Salem*, 11 Pac. 287; *Colstrum v. Ry. Co.*, 24 N. W. 255; *Codman v. Evans*, 7 Allen, 431.)

Even though Sec. 1300 of the Code of Civil Procedure is regarded as providing for both equitable and legal relief in the same action, the question of the existence of the nuisance and the amount of damages must be determined by a jury. (*Basey v. Gallagher*, 20 Wall. 670; *Walker v. Railway Co.*, 165 U. S. 592; *Clark v. Baker*, 6 Mont. 153.) A right of prescription is limited by the character and extent of the user during the period requisite to acquire the right. (*Mississippi Mills Co. v. Smith*, 30 Am. St. Rep. 546; Wood on Limitations, 3d Ed., Sec. 182.)

The question of whether or not the court will grant an injunction in an action to recover damages for a nuisance, where the granting of such injunction is authorized by statute, must be determined by a consideration of the verdict of the jury, and the court cannot make findings of fact in conflict with the verdict of the jury. (Gould on Waters, Sec. 519; *McCloskey v. Doherty*, 30 S. W. 649; *Gould v. Eaton*, 117 Cal. 539; *Moore v. Clear Lake Water Works*, 68 Cal. 146; *Marks v. Weinstock, Lubin & Co.*, 121 Cal. 53; *Barnes v. Sabron*, 10 Nev. 247; High on Inj. Sec. 873; *Webb v. Portland Mfg. Co.*, 3 Sumner, 189; *Peterson v. City of Santa Rosa*, 119 Cal. 387; *Walker v. Emerson*, 89 Cal. 456.)

MR. COMMISSIONER POORMAN prepared the opinion for the court.

This is an appeal from a judgment, and from an order overruling plaintiff's motion for a new trial. The complaint al-

leges that plaintiff is the owner, in possession of, and using certain lands, water ditches and flumes, and that he has a right to the use of certain waters conducted to his land through said ditches and flumes; that defendant, for several months prior to the commencement of the action, in conducting placer mining operations, and in making excavations above the head of plaintiff's ditch, willfully, wrongfully and negligently polluted and fouled the said waters by depositing therein large quantities of debris, sand, gravel and tailings, which were carried and deposited by the waters in plaintiff's ditches and flumes and on plaintiff's land; that defendant threatened to continue these wrongful acts. Plaintiff asked for damages in the sum of \$1,000, and an injunction restraining the continuance of the acts complained of. The defendant controverted the allegations of the complaint that defendant had invaded the rights of plaintiff, and further claimed that by twenty-three years' user he had acquired by prescription, as against plaintiff, the easement and right of flowage of the said waters charged with said tailings, in addition to the right acquired by contract.

It appears that in 1873 defendant's predecessors in interest were conducting placer mining operations in Grizzly gulch, and using the waters thereof for that purpose; that they had also, by means of an artificial ditch known as the "Park Ditch," conducted the waters from another gulch into Grizzly gulch; that these waters so conducted would not naturally flow into Grizzly gulch; that in that year a contract was entered into between the plaintiff and the predecessors of the defendant, by the terms of which, for a valuable consideration, the waters, both of Grizzly gulch and those conducted through this Park ditch, were to be delivered to the plaintiff at the junction of Grizzly gulch and Ore Fino gulch; that the grantors reserved the right to the use of these waters for placer mining purposes, and to sell them to other parties for such use, but were not in any event to use or permit the waters to be used in such manner as to prevent their delivery to plaintiff at the junction of the two gulches;

that deeds were afterwards executed, conveying the right to the use of these waters to this plaintiff; that the waters had been used by the plaintiff since that period after being used for mining purposes by the defendant above this junction; that the waters were permitted to flow down Last Chance gulch, which is formed by the junction of the two gulches above named, for some distance, and thence through plaintiff's ditch to the land in question; that the plaintiff also used certain waste waters flowing through a ditch known as the "Yaw Yaw Ditch," owned by other parties, conducting a part of the waters of Ten Mile creek into Grizzly gulch above the head of plaintiff's ditch. Plaintiff had for a great many years also used these waters for placer mining purposes.

1. If the defendant, under this contract, has the right to deposit tailings and debris in this water to any extent he may choose, it is within his power to make the plaintiff's purchase of the right to the use of the water a burden, rather than a benefit, but the terms of the contract do not confer upon the defendant any right to pollute these waters to any greater extent than that permitted by law. A proprietor acquires no title to the water, but only the right to use the same. (Section 1880, Civil Code.) "No person, natural or artificial, has a right, directly or indirectly, to cover his neighbor's land with mining debris, sand and gravel, or other material, so as to render it valueless." (*Hobbs v. Canal Co.*, 66 Cal. 161, 4 Pac. 1147.) To the same effect are the decisions in *Lincoln v. Rodgers*, 1 Mont. 217, and *Nelson v. O'Neal*, 1 Mont. 284. This was the settled law at the time this contract was entered into. It has ever since remained the law, and is now the law. (*Fitzpatrick v. Montgomery*, 20 Mont. 181, 50 Pac. 416, 63 Am. St. Rep. 622.) But as was said in the last case cited: "We think, however, as is held by the authorities, that each case of this character should be determined by its own facts and circumstances. Persons appropriating water cannot avoid fouling and obstructing, and, to some extent, diminishing, the quantity of water in a stream. These things are unavoidable,

and are permitted to a reasonable extent in the right use of the water." "One must so use his own rights as not to infringe upon the rights of another." (Section 4605, Civil Code.) That which is reasonable, as shown by the facts of each case, applied under the settled rules of law, must be the guide.

The prescriptive right as claimed by respondent, if maintainable under the authorities, is based upon a state of facts to be proven at the trial. It does not appear on the face of the pleadings. The complaint lays the inception of the injury complained of a few months anterior to the commencement of the action. In order to obtain a right by prescription, it is necessary that during the prescriptive period an action could have been maintained by the party against whom the claim is made. A right of prescription is limited by the character and extent of the user during a period requisite to acquire the right. (*Carson v. Hayes*, 39 Ore. 97, 65 Pac. 814; *Wood on Limitation*, 3d Ed., Sec. 182; *Mississippi Mills Co. v. Smith*, 69 Miss. 299, 11 South. 26, 30 Am. St. Rep. 546. It is conceded that this record does not contain all the evidence, and we cannot, therefore, go further in interpreting this contract, or in passing upon the prescriptive right claimed by respondent.

2. Plaintiff claims that he was, as of right, entitled to have the questions as to the existence of the nuisance and as to the damages determined by a jury. This the court denied, but held the action to be in equity, and that the verdict of the jury was merely advisory. That the facts stated in the complaint, if true, constitute a nuisance, both at common law and under the statute, is beyond question. (Section 4550, Civil Code; Section 1300, Code of Civil Procedure; 3 Blackstone, Comm. 217 *et seq.*) The seventh amendment to the Constitution of the United States provides, in substance, that the right of trial by jury shall be preserved in all suits at common law where the amount in controversy exceeds twenty dollars. This provision of the Constitution was in full force in Montana at the time of its admission as a state. (*Kennon v. Gilmer*, 131 U. S. 32, 9 Sup. Ct. 696, 33 L. Ed. 110.) Section 23, Article III, of

the Constitution of Montana, provides, in part, "The right of trial by jury shall be secured to all and remain inviolate."

With reference to the constitutional guaranty of the right of trial by jury secured by this seventh amendment, the Supreme Court of Montana in *Mont. Ore Pur. Co. v. Boston & Montana Con. C. & S. M. Co.*, 27 Mont. 536, 71 Pac. 1005, said: "It must not be overlooked that the right of trial by jury guarantied thereby is the right as it existed at the common law; that is, in that class of cases in which there was no impediment in the way of complete and adequate redress by proceeding according to the court of the common law. The right of trial by jury under territorial government was exactly the same as that guarantied by this amendment—no greater, no less."

If the right of trial by jury existed at the time of the adoption of the Constitution of the state, or of the seventh amendment to the United States Constitution, it still exists, and cannot be taken away by legislative enactment. It cannot become obsolete, for it is perpetuated by the state Constitution, and it continues so long as the constitutional provision continues.

It is beyond question that at common law an action for damages caused by the maintenance of a nuisance was triable by a jury. (Blackstone, Comm., above, and the cases cited below.) In *Basey v. Gallagher*, 20 Wall. 670, 22 L. Ed. 452, the court said: "Sometimes in the same action both legal and equitable relief may be sought, as, for example, where damages are claimed for a past diversion of water, and an injunction prayed against its diversion in the future. Upon the question of damages a jury would be required; but upon the propriety of an injunction, the action of the court alone could be invoked. The formal distinctions in the pleadings and modes of procedure are abolished; but the essential distinction between law and equity is not changed. The relief which the law affords must still be administered through the intervention of a jury, unless a jury be waived; the relief which equity affords must still be

applied by the court itself, and all information presented to guide its action, whether obtained through masters' reports or findings of a jury, is merely advisory."

*Walker v. Railroad Co.*, 165 U. S. 593, 17 Sup. Ct. 421, 41 L. Ed. 837, was an action to recover damages from an overflow of lands, alleged to be caused by a wrongful obstruction of a natural water course. The court, in considering the question as to the right of trial by jury, said: "The Seventh Amendment, indeed, does not attempt to regulate matters of pleading or practice, or to determine in what way issues shall be framed by which questions of fact are to be submitted to a jury. Its aim is not to preserve mere matters of form and procedure, but substance of right. This requires that questions of fact in common-law actions shall be settled by a jury, and that the court shall not assume directly or indirectly to take from the jury or to itself such prerogative."

In *State ex rel. Blanpied v. Currier*, 66 N. H. 622, 19 Atl. 1000, it is said: "By the uniform practice in equity, the maintenance of a private nuisance is not perpetually enjoined unless its existence, if not admitted, is established in a trial at law by the verdict of a jury, if the defendant demands such a trial."

*Hughes v. Dunlap*, 91 Cal. 385, 27 Pac. 642, was an action at law for damages for trespass, joined with a petition for ancillary relief to the equity side of the court. A jury trial was had, and special findings made. The court afterwards refused to adopt the findings of the jury, and made findings of its own upon all the issues, contrary to the findings made by the jury. The court, in passing upon the question, said: "The first point made by appellant is, that the court erred in disregarding the verdict of the jury, and setting it aside without the proceeding of a motion for a new trial. This point is certainly well taken so far, at least, as the issue of damages is concerned. It has long since been held that under our system a legal and equitable remedy may be sought in the same action; but each



remedy must be governed by the same law that would apply to it if the other remedy had not also been asked for. An action to recover damages for past trespasses is as clearly a legal remedy as any that could be named; and it is an action in which a party cannot be deprived of a jury trial. For this reason, therefore, the judgment and order must be reversed."

If in the case at bar no injunction had been asked for, but only damages been demanded, there could then be no question as to the right of trial by jury. Section 1300, Code of Civil Procedure, after defining a nuisance, and specifying who may bring the action, provides, "And by the judgment the nuisance may be enjoined or abated, as well as damages recovered." At common law an action for the recovery of damages occasioned by a nuisance was always triable by a jury, and this whether the action was "on the case" or by "assize of nuisance." In an action on the case only a judgment for damages could be recovered—no abatement could be had. In the latter action (assize of nuisance) a dual judgment could be entered, to-wit, (1) to have the nuisance abated; and (2) to recover damages. But trial by jury was preserved. (3 Blackstone, Comm. 220; *Hudson v. Caryl*, 44 N. Y. 553.)

Under the statute, "the abatement of a nuisance does not prejudice the right of any person to recover damages for its past existence" (Section 4555, Civil Code), and "the remedies against a private nuisance are: (1) A civil action; or (2) abatement." (Section 4590, Civil Code.) Or the aggrieved party may, under Section 1300, Code of Civil Procedure, bring one action for the double purpose of abating the nuisance and the recovery of damages. This is a privilege which the law gives, and in its exercise the party is not required, as a condition for resorting thereto, to waive his right to trial by jury; nor can he, by voluntarily asking equitable relief in addition to legal relief, deprive the defendant of this right; nor can the defendant, by pleading an equitable defense, make the action solely one in equity, though the court may, in passing upon the equitable side of the case, determine that no legal cause of

action exists. The damage feature of an action such as is now under consideration relates only to the past; the injunction relates only to the future; differing in this respect from an action to quiet title. The questions as to the existence of the nuisance and as to the damage feature are for the jury. That relating to the injunction is addressed to the equity side of the court.

*Hudson v. Caryl*, 44 N. Y. 553, was an action for damages occasioned by raising the waters of a certain creek by a mill-dam so as to overflow the lands of plaintiff, and to compel the removal of such dam. The defendant, relying upon a provision of the Constitution that the trial by jury should remain inviolate, claimed such right, which was denied. The appellate court held that the refusal of a jury trial was error, and said, in part: "Article I, Section 2, Const. 1846, demanded that the issues be tried by a jury, and his demand was overruled. In this the court erred. The rule stated in *Davis v. Morris* (36 N. Y. 569, 572-3) is that when the facts stated, arising (as in this case) out of the same transaction, entitle a party to both kinds of relief, the right founded upon the common-law must be tried by jury. \* \* \* The judge must determine whether any of the grounds, upon which the recovery is sought, were such as, at the adoption of the Constitution, were redressed solely by action at law, and, if so, direct that the cause be tried by jury." Later on in the same opinion the court says: "Thus it will be seen that, in this single action, brought for the double purpose of abating a nuisance and the recovery of damages occasioned by it, by whatever name the remedy may have been styled, a case is presented in which a trial by jury has been heretofore used; and hence, that an error was committed in refusing the defendant's demand and proceeding to judgment against him."

It is apparent from these considerations that the facts of the existence of the nuisance and the amount of damages were triable by a jury before the adoption of the Constitution, and that they are still triable by a jury, and that the plaintiff in

this action had the right to have this case presented to and determined by a jury. (*Parker v. Winnipiscogee L. C. & W. Co.*, 2 Black, (U. S.) 545, 17 L. Ed. 333; *Irwin v. Dixon*, 9 How. 10, 13 L. Ed. 25; *Parsons v. Bedford*, 3 Pet. 433, 7 L. Ed. 732.)

3. The respondent contends that the appellant has waived his right to object to the action of the court in regarding this case as one in equity, and treating the findings of the jury as advisory. It appears from the record that at the beginning of the trial a jury was regularly impaneled, and the trial proceeded until the evidence was concluded as though it was a jury trial. The plaintiff then asked the court to give the jury certain instructions, which were submitted, and some of which, at least, were proper to be given on the law phase of the case. The court seems to have regarded this action on the part of plaintiff as raising the question as to whether the action was one at law, or solely in equity, and announced that it would treat the action as one in equity, and regard the verdict of the jury merely as advisory, and refused to give the instructions, but did submit to the jury a large number of questions to be answered by them. The appellant took no exception to this ruling of the court, other than the exception given him by law on the refusal of the court to give proper instructions tendered. The cause was then argued and submitted to the jury, and the jury afterwards returned into court and announced their special findings, which were received and filed, and the jury discharged. The record then contains this statement: "That thereafter defendant \* \* \* moved the court to reject certain of such special findings of the jury, and to make other and additional findings; \* \* \* that thereafter \* \* \* plaintiff made like motion respecting certain of such special findings of the jury in said cause, \* \* \* and said motions were duly heard by the court." It also appears that the court denied the motion of appellant (plaintiff) with reference to the special findings, and sustained the motion of respondent (defendant) with respect thereto.

Section 23, Article III, Constitution, provides: "The right of trial by jury shall be secured to all, and remain inviolate, but in all civil cases \* \* \* upon default of appearance or by consent of the parties expressed in such manner as the law may prescribe, a trial by jury may be waived." This provision of the Constitution that a jury may be waived in the manner prescribed by the law—that is, by written law—is mandatory and prohibitory. (Section 29, Article III.) It is the duty of the court to grant to litigants the rights given them by this constitutional provision. The Constitution, in effect, *commands* that a jury trial, if waived, shall be waived in a certain manner, and *prohibits* its being waived in any other manner. The only manner *prescribed* by law for waiving a jury to a civil action is found in Section 1110, Code of Civil Procedure, which reads as follows: "Trial by the jury may be waived by the several parties to an issue of fact in actions arising on contract, or for the recovery of specific real or personal property, with or without damages, and with the assent of the court in other actions, in manner following: (1) By failing to appear at the trial; (2) by written consent, in person or by attorney, filed with the clerk; (3) by oral consent, in open court, entered in the minutes."

The action at bar does not arise on a contract, nor is it for the recovery of specific real or personal property, but is, so far as the law part of the action is concerned, an action for damages occasioned by the maintenance of a nuisance. It follows, therefore, that no waiver of the jury could be had at all without the consent of the court, and there is no pretense that the plaintiff waived his right to a jury trial by any of the methods which the "law may prescribe," or that the assent of the court was ever given to any waiver at all, except the assent implied from the court's action in holding the case to be wholly in equity.

This action asked for both legal and equitable relief; that is, to have the existence of a nuisance declared, and for damages, which should be determined by the jury, and an injunction,

which should be determined by the court. The special interrogatories submitted to the jury related to both the legal and equitable sides of the action. It appears by the record that the plaintiff did ask the court to set aside certain of these findings of the jury, but there is no intimation in the record as to which or what findings this request was directed. The findings relating to the equitable side of the controversy were not, in any event, binding upon the court, and the parties had the right to ask that they be set aside, or that other findings be made. Which of these classes of findings the plaintiff asked to have set aside, does not appear. So far as the record discloses, this request may have been addressed only to the findings relating to the right of the plaintiff to an injunction. We need not enter the field of speculation as to which class of findings the plaintiff referred.

The plaintiff was under no obligation to demand a trial by jury, for that right was given him by the Constitution; nor was he required to submit to the court the question as to whether he had a right to a jury trial, for that right was also granted to him by the Constitution. The law gave him an exception to the action of the court in refusing to give proper instructions submitted on the law feature of the case. (Section 1080, Code of Civil Procedure, as amended (Sess. Laws 1901, p. 160).) The right of trial by jury may be waived only in the manner provided by law. It cannot be taken away. (*Hodges v. Easton*, 106 U. S. 408, 1 Sup. Ct. 307, 27 L. Ed. 169; *Meech v. Brown*, 4 Abb. Prac. 19.)

Any reason which the court may have stated for refusing to give the instructions is immaterial, and no exception to this reason stated was required. The error committed was in refusing to give the instructions, not in expressing the reason therefor, and all subsequent proceedings were under the exception given by the law. This exception is not waived by a party proceeding with the trial after the instruction has been refused.

This particular question as to the waiver of a jury was once before this court in *Harris v. Lloyd*, 11 Mont. 390, 28 Pac.

736, 28 Am. St. Rep. 475, but by reason of the action of the parties the court declined "to enter this field of research," but reversed the case for other reasons.

In *Biggs v. Lloyd*, 70 Cal. 447, 11 Pac. 831, the court, in considering this question under a constitution and statute similar to those of Montana, held that the right to a jury trial is a constitutional right, and that no act on the part of a litigant shall be deemed a waiver of this right, except such as are so constituted by express law. And this decision was affirmed in *Farwell et al. v. Murray*, 104 Cal. 464, 38 Pac. 199. The same doctrine is also announced in *Swasey v. Adair*, 88 Cal. 179, 25 Pac. 1119.

The plaintiff, by requesting the court to give certain instructions to the jury, emphasized his reliance upon the constitutional guaranty of his right to trial by jury. The court, by its ruling, having forced the plaintiff to treat the case as one in equity, it cannot now be claimed that the plaintiff waived his constitutional right by endeavoring to maintain his claim for damages, and to have the obstruction complained of declared a nuisance, under the theory of the case which the court had compelled him to adopt. The claim that the appellant had waived his right to object to this ruling of the court cannot be sustained.

4. Complaint is also made that certain items of cost were taxed against appellant, to-wit, for a transcript of the testimony given by plaintiff in another action, for a map introduced in evidence by the defendant, and for costs and expenses of a deposition of one of plaintiff's witnesses. These items of cost are included in the judgment, and, as the judgment must be reversed and the case remanded for a new trial, it is unnecessary to pass upon these objections, for the reason that the allowance of these items of cost must depend largely upon the facts of the case. For the guidance of the court, however, we cite the following cases wherein Section 1866 of the Code of Civil Procedure has been construed: *Mont. One Pur. Co. v.*

*Boston & Montana Con. C. & S. M. Co.*, 27 Mont. 288, 70 Pac. 1114; *King v. Allen*, 29 Mont. 5, 73 Pac. 1107.

We recommend that the judgment and order appealed from be reversed.

PER CURIAM.—The foregoing opinion was prepared and submitted for approval while Mr. CALLAWAY was a member of the Commission. For the reasons stated therein, the judgment and order are reversed, and the cause is remanded.

*Reversed and remanded.*

MR. CHIEF JUSTICE BRANTLY: I agree with all that is said in the foregoing opinion touching the right of trial by jury in this case, as an abstract proposition. I do not think, however, that the question is presented in the record for determination. I do not think that the question of the right of trial by jury was presented or decided by a mere refusal on the part of the trial court to submit a particular instruction to the jury. Section 1151 of the Code of Civil Procedure enumerates the rulings and decisions of the trial court for which the law gives an exception, and for the preservation of which, for review in this court, no bill of exceptions is required. In order to have any ruling or decision of the court, other than one of those enumerated in Section 1151, *supra*, reviewed by this court, it is necessary for the party complaining to take his exception and preserve the ruling in a bill of exceptions. Among rulings enumerated in this section is not found a refusal on the part of the trial court to grant a trial by jury. What occurred at the time of the trial is stated in the third paragraph of the opinion, and, although it appears that the court announced that it would treat the action as one in equity, and regard the verdict of the jury as advisory only, appellant took no exception to this ruling. Nor has he presented this ruling in a bill of exceptions. Having taken no exception to the ruling, I do not think he has any standing in this court to have the ques-

tion of his right in the premises determined. I think his behavior shows clearly that it was his intention to waive, and that he did waive, the right to have the cause submitted to a jury as an action at law. I therefore do not agree with the conclusion stated in this paragraph of the opinion—that a jury trial can be waived only by observance of the formalities provided by statute. In any event, he is estopped by his behavior to say that he was denied his constitutional right.

It has repeatedly been held by this court that, where a party adopts a particular theory of a case in the trial court, he will not be permitted in this court to change that theory for the purpose of obtaining an advantage which he would have had, had he adopted the correct theory of the case upon the trial. (*Wortman v. Montana Central Railway Co.*, 22 Mont. 266, 56 Pac. 316; *Finch et al. v. Kent and Wife*, 24 Mont. 268, 61 Pac. 653; *Durfee v. Harper*, 22 Mont. 354, 56 Pac. 582; *Talbott v. Butte City Water Co.*, 29 Mont. 17, 73 Pac. 1111; *Hendrickson v. Wallace*, 29 Mont. 504, 75 Pac. 355.) While only two of these cases refer to the matter of the right of trial by jury, yet the principle of the theory of the case is as applicable to cases involving the right of trial by jury as it is to other cases where the question of the right of trial by jury was not before the court. If a party himself assumes that his cause is one in equity, and not at law, and proceeds upon this theory through the trial in the district court, I do not think he should be permitted to raise the question for the first time in this court, that he has been deprived of the right of trial by jury, simply because the formalities prescribed by the statute for waiving such right have not been observed.



## HURLEY, RESPONDENT, v. O'NEILL, APPELLANT.

(No. 2,025.)

(Submitted December 13, 1904. Decided January 21, 1905.)

*Partition—Burden of Proof—Dower—Sale—Parties.***Partition—Prior Agreement for—Burden of Proof.**

1. In a suit for partition, the party who alleges prior partition or relies upon an oral agreement respecting it, has the burden of showing the existence of such agreement.

**Partition—Course When Not Feasible without Prejudice to Owners.**

2. Where property is so situated that partition cannot be made without great prejudice to the owners, the court may, under Code of Civil Procedure, Section 1355, order a sale thereof.

**Partition—Dower—Wife of Tenant-in-Common—Indispensable Party.**

3. Under Code of Civil Procedure, Section 1342, the wife of a defendant tenant-in-common, having an inchoate right of dower in an undivided share of the property, is an indispensable party to a suit for partition.

*Appeal from District Court, Silver Bow County; E. W. Harney, Judge.*

ACTION for partition by Mary Ann Hurley against Patrick O'Neill. From an interlocutory decree, and from an order overruling motion for new trial, defendant appeals. Reversed.

Mr. Geo. B. Dygert, Mr. L. J. Hamilton, and Mr. F. D. Lingenfelter, for Respondent.

There being a substantial conflict in the evidence upon the question as to whether respondent ever had any actual notice of the existence of the alleged oral agreement for partition of the lot, the findings and decree of the district court must be sustained. (*Lincoln v. Rogers*, 1 Mont. 286; *Orr v. Haskell*, 2 Mont. 255; *Beck v. Beck*, 6 Mont. 285; *Landsman v. Thompson*, 9 Mont. 398; *Carron v. Wood*, 10 Mont. 500; *O'Donnel v. Bennett*, 12 Mont. 242; *Bradshaw v. Degenhart*, 15 Mont. 267; *Methodist Church v. Rickards*, 16 Mont. 70; *Beckstead v. Montana Union R. R. Co.*, 19 Mont. 147; *Baxter v. Hamilton*,

20 Mont. 327; *O'Rourke et al. v. Sherman*, 23 Mont. 310; *Wastl v. Montana Union Railway Co.*, 24 Mont. 159; *H. & L. S. & R. Co. v. Lynch et al.*, 25 Mont. 497; *M. O. P. Co. v. B. & M. C. C. & S. M. Co.*, 27 Mont. 288.)

"The objection of defect of parties is waived if not raised by demurrer or answer." (*Hines v. Consol. C. & L. Co.*, 29 Ind. App. 563, 64 N. E. 886; *Hellams v. Prior*, 64 S. C. 543; *Mansfield*, Dig. Sec. 5028, par. 4; *Boseker v. Chamberlin*, 160 Ind. 114, 66 N. E. 448; *Engel v. Dads*, (Neb.) 92 N. W. 629; *Whitecotton v. St. Louis & H. R. Co.*, (Mo. App.) 78 S. W. 318; *Bauer v. Parker*, 82 App. Div. (N. Y.) 289; *Kerry v. Pacific Marine Co.*, 121 Cal. 564.)

*Mr. Jas. H. Baldwin*, for Appellant.

There can be no such substantial conflict as will prevent the court's looking into the evidence and determining therefrom whether or not the lower court's determination of the questions involved was correct or not. (*Arnold v. Sinclair*, 12 Mont. 268, 277; *Campbell v. Great Falls*, 27 Mont. 89; *Harrington v. B. & M. Co.*, 27 Mont. 13; *Hamilton v. Nelson*, 22 Mont. 540; *Penny v. Oldhauser*, 24 Mont. 287, 292.)

The district court is without jurisdiction in a suit for partition where the wife of the defendant, having an inchoate right of dower in the premises in controversy, has not been made a party. (*DeUprey v. DeUprey*, 27 Cal. 329, 333; *Wright v. Wright*, 53 Pac. 684; *Harrison v. McCormick*, 74 Cal. 435, 443; *Harrison v. McCormick*, 69 Cal. 621; *O'Connor v. Irvine*, 74 Cal. 435, 443; *Robinson v. Glasson*, 53 Cal. 38; *Osterhurdorf v. Ulster*, 98 N. Y. 239; *Bliss on Code Pleading*, Secs. 96, 111; *Patterson v. Yuba*, 12 Cal. 107; *Riddle-Boggs v. Merced M. Co.*, 14 Cal. 277, 364; *Hutchinson v. Burr*, 12 Cal. 103.)

MR. COMMISSIONER POORMAN prepared the opinion for the court.

This is an appeal from an interlocutory decree rendered in

a suit for partition, and from an order overruling a motion for a new trial.

The facts appear to be that the defendant and one Dennis D. Sullivan in 1889 purchased a certain tract of land, 100 feet in length and 30 feet in width, in Butte, Montana; that their titles were obtained from a common source, and, so far as the record title is concerned, they were tenants in common. It also appears that at the time of the purchase the territory adjoining the lot was unoccupied, and that they had free access to all parts of the land purchased, by passing over other lands; that it was agreed at the time between defendant and Sullivan that Sullivan should erect a dwelling house on the east end of the lot, and the defendant herein should erect a house on the west end of the lot. Neither party appears to have borne any of the expense occasioned by the construction of these houses, except the one erected by himself. The parties moved into the houses with their families, and occupied the same continuously until 1895, when Sullivan sold his interest in the lot to the plaintiff herein, who, with her husband, took immediate possession of the house erected and occupied by Sullivan. The part of the lot upon which the defendant, O'Neill, had erected his house, proved to be the front end of the lot; and the adjoining property having become occupied or used, there was no practical means of reaching the rear end of the lot, occupied by the grantee of Sullivan, except by passing over that portion of the lot occupied by defendant. A difficulty arose between the parties, and the plaintiff brought this action for partition.

The defense is to the effect that Sullivan and the defendant had, prior to the time of the sale by Sullivan to the plaintiff, orally agreed upon a division of the lot, to-wit, that the defendant should occupy the front fifty feet of the lot, on which the house erected by him was located, and that Sullivan should occupy the rear fifty feet of the lot, and that the plaintiff well knew of this agreement at the time she purchased the interest of Sullivan.

The findings of the court are to the effect that the plaintiff had no knowledge of the existence of any oral agreement relative to the division of the lot; that she was entitled to the relief asked for in her complaint; that the premises, and the whole thereof, are so situated that actual partition into distinct parcels cannot be made without great prejudice to both plaintiff and defendant. The court therefore entered an interlocutory decree to the effect that the premises be sold under the direction of a referee appointed for that purpose, and that the referee ascertain if the wife of the defendant had released her dower right in the premises to her husband, and, if she had not, or would not consent to do so, to ascertain what would be a just compensation to pay her for her dower interest. The defendant, on this appeal, urges that the evidence is not sufficient to sustain the findings, that the findings are contrary to the evidence and against law, and that the court could not enter a decree at all, for the reason that the wife of the defendant was an indispensable party to the action.

The burden of showing the existence of an oral agreement respecting the partition of the lot rests upon the defendant, or the party who alleges or relies upon the same. There is no evidence in this record showing that the plaintiff, at the time she purchased the interest of Sullivan, had notice of the existence of any agreement respecting the partition or division of this lot. There was nothing in the occupation of the lot by both the tenants in common, though they resided in separate houses, that was inconsistent with the record title, for, being tenants in common, each had the right of possession. The grantor of plaintiff testifies that there never was any agreement between himself and the defendant respecting a division of the lands, further than it was agreed as to the part of the lot on which each should erect his own house; that, at the time he made the sale to the plaintiff, he told her that she had an interest in the whole lot—the front as well as the back. There is some evidence on the part of the defendant as to statements made by the plaintiff and her husband, who acted as her agent, which would

tend to show that shortly after the purchase she had notice that some agreement existed between Sullivan and defendant with reference to a division of the lot. This, however, is disputed.

Each party, it appears, had paid taxes on one-half the lot since its purchase. The facts are not materially different from those presented on the former appeal, where the questions respecting the payment of taxes and survey of the lot, putting up stakes, the construction of outbuildings, and erection of fences, etc., were all passed upon, and the court said: "It is apparent that these two items, whether considered separately or together, fall short, in themselves, of being sufficient to justify the inference that the plaintiff, when she purchased the undivided one-half interest from Sullivan in March, 1895, had notice of the equitable rights of the defendant." (*Hurley v. O'Neill*, 26 Mont. 269, 67 Pac. 626; *Mullins v. Butte Hardware Co.*, 25 Mont. 525, 65 Pac. 1004, 87 Am. St. Rep. 430; *Sheldon v. Powell*, 31 Mont. 249, 78 Pac. 491.) Section 1355, Code of Civil Procedure, provides, in substance, that if it appears that the property, or any part, is so situated that partition cannot be made without great prejudice to the owners, the court may order a sale thereof. It appears from the evidence in this case that this lot is so situated that it cannot be divided without great prejudice to the owners.

We find no error in the findings of the court respecting the facts presented in this record.

2. A further objection urged by appellant is to the effect that the wife of a defendant tenant-in-common is an indispensable party to a suit for partition of real estate. It appears on the face of the complaint that the wife of defendant was not made a party to this action. It also appears from the evidence of plaintiff that she knew at the time this action was commenced that the wife of defendant was residing with defendant on this land. No demurrer was filed to the complaint, nor was any objection made on the ground of defect or misjoinder of parties, and the question was first raised in the motion for a new trial. Whether the wife of a co-tenant is a necessary party to an ac-

tion for partition, unless she has some interest other than the inchoate right of dower not admeasured, is unnecessary to be considered here.

An action for partition, under our Code, is a special statutory proceeding. (*Ryer v. Fletcher-Ryer Co.*, 126 Cal. 482, 58 Pac. 908, and cases cited; *Waterman v. Lawrence*, 19 Cal. 210, 79 Am. Dec. 212.) We must therefore look to the statute for the authority to bring the action, and for the procedure to be followed both in bringing the action and after it is instituted. Sections 1340 *et seq.* of the Code of Civil Procedure treat fully the subject of partition. Section 1342, treating of the parties to the action, reads, in part: "Every person having an inchoate right of dower in an undivided share in the property; and every person having a right of dower in the property, or any part thereof, which has not been admeasured, must be a party to an action for partition." Section 1343 provides that the plaintiff may, at his election, make others enumerated therein parties to the action.

The first section quoted names those who *must* be parties to the suit. The second names those who *may* be parties to the suit. A person having the inchoate right of dower is named among those who *must be* parties to the action. Section 1344 provides that the interests of all the persons in the property, whether such persons be known or unknown, must be set forth in the complaint specifically and particularly, as far as known to the plaintiff. (Sections 1342, 1353, Code of Civil Procedure; *Dameron v. Jameson*, 71 Mo. 97; *Davis v. Lang*, 153 Ill. 175, 38 N. E. 635.)

Sections 1391 and 1392 provide how the rights of a party having an existing right of dower may be protected, but, if the wife is not a party to the action, the plain method of procedure positively stated in Section 1342 has not been followed, and any decree which the court may render is not binding upon her; and the rights of all the parties in the premises cannot be determined, and the subject-matter of the action will therefore

be held open for further litigation unless the parties voluntarily agree.

"A court of equity will not permit litigation by piecemeal. The whole subject-matter and all the parties should be before it, and their respective claims determined once and forever. \*

\* \* If the necessary parties to a full determination are not before the court, it is the duty of the court, on its own motion, to order them brought in; and this, although the defendants in the action have omitted to raise an objection of defect of parties by demurrer or answer. The failure of the court so to do is fatal to the judgment." (*O'Connor v. Irvine*, 74 Cal. 435, 16 Pac. 236.)

In *Holloway v. McIlhenny*, 77 Tex. 657, 14 S. W. 240, the court said: "Appellee insists that, because there was no attempt in the court below to arrest the proceedings for want of necessary parties until the final judgment, \* \* \* the objection comes too late. But we are of opinion that the error cannot be cured by failure to take action in the trial court. A decree of partition in a suit to which one or more of the owners of the land are not parties does not affect their rights. They cannot be bound by the decree, and can have it set aside in any proper proceeding in which all parties are before the court. Courts of justice do not sit to enter empty decrees, and hence will arrest a proceeding of this character for want of necessary parties at any stage of the proceedings."

Under Section 1342 above the wife of the defendant was an indispensable party, and, not having been made a party, the court could not proceed to judgment.

We recommend that the judgment and order be reversed, and the cause remanded.

PER CURIAM.—For the reasons stated in the foregoing opinion, the judgment and order are reversed, and the cause is remanded.

*Reversed and remanded.*

## McKELVEY, RESPONDENT, v. PERHAM, APPELLANT.

(No. 2,024.)

(Submitted December 13, 1904. Decided January 21, 1905.)

*Sale—Delivery—Bill of Lading—Action for Price.*

Defendant ordered of plaintiff lime which he wished to use on a certain date. Plaintiff did not place the lime on the car until six days thereafter, and after loading it, he received a letter from defendant countermanding the order. He could have recalled the shipment any time within twenty-four hours after receiving such letter, but did not. Plaintiff did not send defendant the bill of lading, having kept it, as he testified, until he could "see what was going to happen." *Held*, that the lime was not delivered, and defendant was not under any obligation to accept it on its arrival.

*Appeal from District Court, Lewis and Clarke County; J. M. Clements, Judge.*

ACTION by James McKelvey against W. T. Perham. From a judgment for plaintiff, and an order denying him a new trial, defendant appeals. Reversed.

Mr. C. R. Stranahan, for Appellant.

The defendant was entitled to have its motion for a nonsuit granted in this case for the reason that the plaintiff, having retained the bill of lading for some purpose of his own, retained the *jus disponendi* of the property. (Sec. 2831, Civil Code; *First Nat'l Bank v. Andrews*, 5 Mont. 328; *Shaw v. Railroad Co.*, 101 U. S. 564; *Willman M. Co. v. Fussy*, 15 Mont. 511; *Herbert v. Winters*, 15 Mont. 552; *Ramish v. Kirschbaum*, 40 Pac. 534; *Armstrong v. Coyne*, 67 Pac. 537; *Bergman v. Indianapolis Ry. Co.*, 104 Mo. 77; *Mechem on Sales*, Vol. I, p. 779.) The burden was entirely upon the plaintiff to prove that the order was filled as given. (*Barton v. Kane*, 17 Wis. 37; *Woodruff v. Noyse*, 15 Conn. 335; *Wold v. Deitzsch*, 75 Ill. 205; *Bruse v. Pearson*, 3 Johns. 534.)



MR. COMMISSIONER BLAKE prepared the opinion for the court.

This action was commenced in the justice's court by plaintiff (respondent) to recover the sum of \$83.75 for 335 bushels of lime. It is alleged in the complaint that plaintiff, at the special instance and request of defendant (appellant), sold, September 12, 1901, and delivered the lime to defendant at Helena, Montana. On the trial judgment was entered for respondent for the amount of his demand, and an appeal was taken to the district court. By agreement of the parties the motion of defendant for leave to file an amended answer was granted. The answer alleged: "That thereafter, and on the 12th day of September, 1901, defendant notified plaintiff by letter, which said letter plaintiff received on said last-named date, not to ship said lime, and further notifying plaintiff that defendant had ordered lime elsewhere, and that plaintiff, in disregard of said notice from defendant, and thereafter, to-wit, on the 13th day of September, 1901, shipped said lime to defendant over the Montana Central Railroad. And defendant avers that, had plaintiff used due diligence in the premises, he could have prevented the said shipment of lime to defendant, and any consequent loss to himself thereby." The answer contained a counterclaim setting forth that plaintiff agreed to deliver the lime not later than the 6th day of September, 1901, and that by reason of his failure so to do the defendant had been injured in the sum of \$500.

The action was tried *de novo* by the court below with a jury. The plaintiff testified in his own behalf, and rested, and the motion of defendant for a nonsuit was sustained upon the following grounds: That the title to the lime never passed to defendant, and that plaintiff, if entitled to recover, could maintain an action for damages for a breach or rescission of the contract. The defendant was then allowed to call witnesses to establish his counterclaim. After the defendant had been examined and cross-examined, the court reconsidered the ruling

granting the motion for a nonsuit, and ordered the same to be overruled. Evidence was offered by the parties covering all the issues, and judgment was entered on the verdict for plaintiff. Defendant appealed from the judgment and an order denying him a new trial.

The testimony of plaintiff tended to prove that two men—O'Brien and Campbell—in the employ of defendant told plaintiff in Helena, September 2, 1901, that they wanted some lime shipped from Helena to Boulder, Montana, for defendant; that upon the next day the plaintiff, in Helena, and the defendant, in Boulder, had a conversation through the telephone; that defendant gave an order for the lime, and plaintiff informed him that he had no lime on hand, and would ship it as soon as he could over the Great Northern on a Montana Central car, loaded at the depot in Helena; that the lime was loaded on the car September 12, 1901, and the plaintiff received the bill of lading, which he retained and produced on the trial, to-wit:

"Montana Central Railway Company.

"Helena, Montana, Station, Sept. 12, 1901.

"Forwarded by James McKelvey.

\* \* \* \* \*

17,782

One Car

W. T. Perham

Lime

Boulder, Mont.

Via Great Northern Railway Line.

"....."

There is no controversy about the following facts: That about 5 o'clock in the afternoon of the day after the lime had been loaded on the car the plaintiff received a letter from defendant, to-wit: "Boulder, Montana, Sept. 11, 1901. Mr. McCalvin, Helena, Montana. Dear Sir: I have been very much disappointed you not sending me lime as agreed upon, I waited until Monday and no lime I then ordered a car from Butte. Your local lime came Tuesday I have used that but will not be able to use any more. Very Truly Yours, W. T. Perham." The plaintiff then sent a telegram to defendant,

reading, "Car shipped, cannot recall it," or words to that effect. The plaintiff, in explaining his conduct, testified: "I did not send this telegram until I got the letter cancelling the order. I was going to ship the bill of lading the same as I always do. I did not send him the bill of lading—not until I would see what was going to happen."

The defendant required the lime for use in a building he was constructing at Boulder on or before September 6, 1901, and did not need it after that date. The carload of lime left Helena September 13th at 6:25 p. m., and arrived at Boulder at noon upon the succeeding day. The bill of lading given to plaintiff was not sent to defendant, and the lime was not accepted or delivered. The car could have been stopped upon the request of plaintiff by the railroad company at any time up to 6 o'clock p. m., before the train started from Helena.

The testimony of the parties is conflicting concerning the material parts of the contract, but in the view we take there is one question for our determination. Conceding everything plaintiff sought to prove on the trial, he was notified on September 12, 1901, when he read the above letter, that defendant refused to comply with the contract, and did not intend to buy the lime. It was the duty of defendant to use reasonable diligence in the exercise of what he considered his rights under the circumstances. The facts, which are not controverted, show that plaintiff had twenty-four hours during which he could have stopped said car at Helena. The plaintiff did not make any effort in this direction, but permitted the lime to be transported to Boulder, retaining the bill of lading. What were the legal consequences of this act? The explanation of the plaintiff for his retention of the bill of lading that he "would see what was going to happen" is not consistent with his position that defendant was the owner of the lime September 12, 1901. The authorities in this jurisdiction are in harmony as to the nature of this instrument. (*First National Bank v. McAndrews*, 5 Mont. 325, 5 Pac. 879, 51 Am. Rep. 51; *Walsh v. Blakely*, 6 Mont. 194, 9 Pac. 809; *Willman M. Co. v. Fussy*, 15 Mont.

511, 39 Pac. 738, 48 Am. St. Rep. 698; *Herbert v. Winters*, 15 Mont. 552, 39 Pac. 906.)

In *First National Bank v. McAndrews*, *supra*, the court said: "Hence it is held by the authorities that the transmission of a bill of lading by the consignor to the consignee is a delivery of the possession of the goods covered by it, and that thereby the title to the property passes from the consignor to the consignee." In *Pollard v. Vinton*, 105 U. S. 7, 26 L. Ed. 998, the court said: "In the hands of the holder it (the bill of lading) is evidence of ownership, special or general, of the property mentioned in it, and of the right to receive said property at the place of delivery." The Civil Code provides (Section 2835): "A carrier is exonerated from liability for freight by delivery thereof, in good faith, to any holder of a bill of lading therefor, properly indorsed, or made in favor of the bearer."

We are of the opinion that the property in controversy was not delivered, and that defendant (appellant) was not under any obligation to accept the lime upon its arrival at Boulder.

We recommend that the order and judgment appealed from be reversed, and that the cause be remanded for a new trial.

PER CURIAM.—For the reasons stated in the foregoing opinion, the order and judgment are reversed, and the cause is remanded.

*Reversed and remanded.*

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### IN RE SCHEUER'S ESTATE.

SCHEUER, APPELLANT, *v.* KINMAN, RESPONDENT.

(No. 2,010.)

(Submitted November 16, 1904. Decided January 23, 1905.)

*Guardianship—Incompetent Persons—When Relation Terminates — Restoration to Capacity—Effect—Termination of Guardianship—Probate Court—Jurisdiction.*

**Guardian's Account—Settlement—Appeal.**

1. An order confirming a guardian's account, being appealable under Session Laws of 1899, page 146, and no appeal having been taken therefrom, questions respecting its settlement cannot be considered on a subsequent appeal from an order of sale of the ward's real estate.

**Probate Courts—Jurisdiction—Real Property—Sale—Guardians—Insane Ward—Restoration to Capacity.**

2. The district court, sitting as a court of probate, has no jurisdiction to entertain or grant an order for the sale of real property belonging to one who has been under guardianship because of mental incapacity, after such person has been judicially restored to capacity.

**Probate Courts—Jurisdiction—Limited.**

3. District courts, sitting as courts of probate, are courts of special and limited jurisdiction, possessing no powers other than those expressly or by necessary implication conferred by statute.

**Guardians—Authority Over Estate of Ward—Statutory Construction.**

4. The authority of a guardian of an incompetent over the person or estate of the ward is not extended by Code of Civil Procedure, Section 2972, to the time when he is "legally discharged" by an order of court, but such guardianship is, under Section 2973 of the same Code, terminated, *ipso facto*, by the judicial determination that the ward is of sound mind, and the adjudication of his restoration to capacity.

*Appeal from District Court, Silver Bow County; John B. McClernan, Judge.*

JUDICIAL proceedings in the estate and guardianship of Frederick V. Scheuer, a mental incompetent. From an order for a sale of so much of his real estate as had been in the possession of his guardian, Charles E. Kinman, from his appointment until an order of restoration of capacity, Scheuer appeals. **Reversed.**

*Messrs. Sanders & Sanders, and Messrs. Hinkle & Wallace, for Respondent.*

The possession of the ward does not carry with it, as a legal consequence, the abandonment by or the supercession of the control and jurisdiction of the court over the realty for the purposes of settlement of the guardianship and the sale of the real estate, now or at any time since the order of restoration, and in contemplation of law the guardian remains in possession until he is legally discharged. (*In the Estate of Henning*, 128 Cal. 214; *Graeyer v. Superior Court*, 117 Cal. 640; *In the Estate of Clary*, 112 Cal. 292; *Woerner on American Law of Guardianship*, p. 428.)

The order restoring the ward to mental capacity is not such an order as, in its legal effect, discharges the guardian even as a guardian over his ward's person. (*Marlow v. Lacy*, 68 Tex. 154; *Probate Court v. Child*, 51 Vt. 82; *State ex rel. Kelly v. Probate Court*, 85 N. W. 917.) An order restoring a ward to mental capacity cannot terminate the guardianship over the ward's estate under the plain provisions of our law. A guardian in a general sense is a trustee. (1 Perry, Trusts, Sec. 1; 1 Pomeroy, Eq. Jur. Sec. 57; 2 Pomeroy, Eq. Jur. Secs. 1088, 1097; Field, Inf. Sec. 132; Overt., Liens, Sec. 584; *Curran v. Abbott*, 40 N. E. 1091, 3; *Point v. Frank*, 64 S. W. 637.) And it is well settled law that a trustee has an equitable right to be reimbursed for all reasonable expenses properly incurred in the execution of his trust, and that the expenses of a trustee in the execution of his trust are a lien upon the estate, and he will not be compelled to part with the property until the disbursements are paid. (2 Perry, Trusts, Secs. 4485, 907, 910; 2 Pomeroy, Eq. Jur. Sec. 1085; 2 Jones, Liens, Secs. 1175, 1177; Overt., Liens, Secs. 587, 589.)

The district court possesses the powers of a court of equity in the settlement of guardians' accounts. Jurisdiction remains in the probate court, after a minor's majority, over the estate in the hands of the guardian for the purposes of an accounting of the guardian as to transactions during the minority of the ward. (*Estate of Curtis*, 121 Cal. 468, 474.) The jurisdiction over guardians and their accounts is strictly equitable; the proceedings, in whatever court carried on, are equitable in their nature, and governed by the rules of equity. In California the superior court, even when sitting in probate, possesses all the powers of a court of equity which are necessary or incidental to the matter before it, and is guided and controlled in matters of guardianship and the like by the rules of equity. (*Estate of Kincaid*, 120 Cal. 211, opinion by Van Vleet, J., dissenting; *In re Moore*, 96 Cal. 522, 528; *In Estate of Clos*, 110 Cal. 494, 501-502; *In re Clary*, 112 Cal. 292; *In re Beisel*, 110 Cal. 267; *Pyatt v. Pyatt*, 46 N. J. Eq. 285, quoted in *Estate of Curtis*, 121 Cal. 268; *Cutting v. Scherzinger*, 68 Pac. (Ore.) 395.)

The account and report, upon a reference, were, without objection by Scheuer, adopted and approved, and no appeal has ever been taken therefrom. (*Jarret v. Andrews*, 70 Ky. 311; *Cook v. Rainey*, 61 Ga. 452; *Cohen v. Shyer*, 1 Tenn. Ch. 192; *Roseborough v. Roseborough*, 62 Tenn. 314.)

*Mr. M. E. LeBlanc*, and *Mr. George F. Shelton*, for Appellant.

When the court made and entered its order restoring Scheuer to capacity and adjudging him competent to manage his own affairs, the guardianship ceased; the power of the guardian over the person or property of Scheuer was terminated, *ipso facto*, and the court was without jurisdiction to order Kinman to sell the property of Scheuer. (*Davidson v. Wampler*, (Mont.) 74 Pac. 82; *State ex rel. Donovan v. District Court*, 27 Mont. 415, 71 Pac. 401; *In re Livermore's Estate*, 64 Pac. 113; *Curtis v. Devoe*, 121 Cal. 468, 53 Pac. 936, 939; *In re Allgier*, 65 Cal. 229; *Alford v. Halbert*, 74 Tex. 346, 12 S. W. 75; *In re Kincaid's Estate*, 120 Cal. 203, 52 Pac. 492.)

Acts done by a guardian after the majority of his ward are not valid, and the probate court has no jurisdiction over the same. (*Curtis v. Devoe*, 121 Cal. 468, 53 Pac. 936; *In re Latham*, 41 N. C. 406; *Probate Judge v. Stevenson*, 55 Mich. 320; *Lyster's Appeal*, 54 Mich. 325; *Hudson v. Bishop*, 32 Fed. 519; *Berkin v. Marsh*, 18 Mont. 152; Woerner on Guardianship, Sec. 710; *Wyatt v. Woods*, 31 Mo. 351, 353; *Frost v. Winston*, 32 Mo. 489; *Matter of Richards*, 6 Serg. & R. 462; *Brown v. Chadwick*, 79 Mo. 587.) Guardianship is terminated on judicial ascertainment of restoration, and the court has no further jurisdiction over the guardian than to compel accounting. (Woerner on Guardianship, Sec. 150, p. 501.)

MR. JUSTICE HOLLOWAY delivered the opinion of the court.

On October 21, 1901, an order was duly made in the district court of Silver Bow county, Montana, adjudging Frederick V.

Scheuer mentally incompetent to manage his own affairs, and appointing Charles E. Kinman guardian of the person and estate of such incompetent. Thereafter, on March 19, 1903, upon the petition of the next friend of Scheuer, a hearing was had before the court, and Scheuer was thereupon adjudged restored to mental capacity. On April 7, 1903, Kinman, as guardian, returned into court his report, designated "Third Annual Report" of such guardianship, to which report certain objections were made by Scheuer. A reference of the report and objections was made, a report from the referee had, and on August 3, 1903, an order was made by the court confirming the report of the guardian as amended by the recommendations of the referee. This report, as amended, showed a balance due to the guardian from the ward's estate of \$2,043.97. On August 18, 1903, Kinman, still pretending to act as guardian, presented to the court a petition for the sale of certain of the real estate belonging to Scheuer, for the purpose of raising money to discharge the amount so found due. An order to show cause was issued and served. Thereupon Scheuer filed a motion to dismiss such petition on the ground of a want of jurisdiction in the court to entertain it. This motion was overruled, and Scheuer then filed his objections to the petition, specifying particularly the fact that the court was without jurisdiction to entertain the petition, and urging as a reason for such objection the fact that Scheuer had several months prior thereto been adjudged restored to mental capacity. In the petition for the order to sell, the guardian sets forth the fact of the restoration of Scheuer to capacity, and that from that date subsequently Scheuer had been in possession and control of the property sought to be sold. The objection of Scheuer to the granting of the petition was overruled, and on September 15, 1903, the court made an order for the sale of so much of the real estate belonging to Scheuer, and which had been in the possession of the guardian from the date of his appointment until the date of the order of restoration, as might be necessary to raise the



amount due the guardian. From this order of sale, Scheuer appealed.

Certain questions respecting the settlement of the guardian's account are sought to be presented here, but as the order confirming such report was an appealable order (Sess. Laws 1899, p. 146), and there was not any appeal taken therefrom, we cannot on this appeal consider the same.

But one question is presented for settlement, namely, has the district court, sitting as a court of probate, any jurisdiction to entertain a petition for the sale of real property belonging to one who has been under guardianship because of his mental incapacity, presented after an order has been made judicially determining and adjudging such person restored to capacity, and to be of sound mind and capable of taking care of himself and of his property, or to grant an order of sale based upon such petition? A solution of this question rests upon the construction of certain sections of the Code of Civil Procedure, which, at first blush, appear to be in hopeless conflict.

Section 2972 provides that every guardian of an incompetent person shall have the care and custody of the person of his ward, and the management of all his estate, until such guardian is legally discharged.

Section 2973 provides for an inquiry to have the fact of the ward's restoration to capacity judicially determined, and provides that if, upon such inquiry, it be found that the person is of sound mind and capable of taking care of himself and his property, his restoration to capacity shall be adjudged, "and the guardian" of such person shall cease. It is evident that the term "guardianship" was intended to be used instead of the term "guardian."

The language of Section 2973, above, is susceptible of but one construction, namely, that the judicial determination that the ward is of sound mind, and capable of taking care of himself and his property, and the adjudication of his restoration, do, *ipso facto*, terminate the guardianship. (Woerner's American Law of Guardianship, Sec. 150; *Probate Judge v. Steven-*

son, 55 Mich. 320, 21 N. W. 348; *In re Latham*, 6 Ired. Eq. (N. C.) 406.) Section 2972 also provides that the bond of a guardian of an incompetent person shall contain like conditions as prescribed for the bond of a guardian of a minor.

Section 2957, among other things, provides that the bond of a guardian of a minor shall be conditioned "that the guardian will faithfully execute the duties of his trust according to law, and the following conditions shall form a part of such bond without being expressed therein: \* \* \* (3) To render an account on oath of the property, estate and moneys of the ward in his hands and all the proceeds or interests derived therefrom, and of the management and disposition of the same, within three months after his appointment, and at such other times as the court or judge directs, and *at the expiration of his trust* to settle his accounts with the court or judge, or with the ward, if he be at full age, or his legal representatives, and to pay over and deliver all the estate, moneys and effects remaining in his hands, or due from him on such settlement, to the person who is lawfully entitled thereto. \* \* \*". If the order of restoration terminates the guardianship, then the expression "the expiration of his trust," as used in this section, and the order for the restoration of the ward to capacity, as provided for in Section 2973, must of necessity refer to the same event in point of time; and, if this be so, then the duty of the guardian of an incompetent person upon the termination of his guardianship is plain. He shall settle his accounts with the court or judge, or with the ward, and pay over and deliver all the estate, moneys and effects remaining in his hands, or due from him on such settlement, to the person lawfully entitled thereto. (Section 2957, *supra*; *Shepherd v. Newkirk*, 21 N. J. Law, 302.)

The powers, duties and liabilities of a guardian of a person of unsound mind are the same, and subject to the same restrictions, as those of a guardian of a minor. (Section 2957, above; Woerner's American Law of Guardianship, Sec. 137.)

In *In re Allgier*, 65 Cal. 228, 3 Pac. 849, it is said: "When

a ward attains the age of majority, the office of guardian comes to an end, and it is *then* the duty of the guardian, and one of the obligations of his bond, to exhibit a final account of his guardianship to the probate court, make a settlement with the probate judge or with the ward, and deliver all the property in his hands belonging to the ward. (Section 1754, Code of Civil Procedure.) Failure to do this constitutes a breach of his bond, for which he and his sureties are liable after settlement of the guardianship."

But it is contended that under the provisions of Section 2972, above, the management of the ward's estate is imposed upon the guardian until he is legally discharged, and that the phrase "legally discharged" means discharged by an order of the court. If this contention be sustained, then the last sentence of Section 2973 is meaningless, for the court might not make an order discharging the guardian for a year or more after making the order restoring the ward to capacity. Indeed, this very case presents an instance where the ward was adjudged restored to mental capacity in March, and yet as late as September following no order for the discharge of the guardian had been made. If the contention of the respondent could be maintained, then the guardianship continues, and a person *sui juris*, against his own will, is subject to the control and government of a guardian, which in itself involves a contradiction of terms and a legal impossibility.

Respecting the term of office of a guardian of a minor, Section 2956 provides: "Every guardian appointed shall have the custody and care of the education of the minor, and the care and management of his estate, until such minor arrives at the age of majority or marries, or until the guardian is legally discharged."

Section 1753 of the California Code of Civil Procedure is identical with our Section 2956, above, and, construing that section, the supreme court of that state, in *Curtis v. Devoe*, 121 Cal. 468, 53 Pac. 936, said: "We do not think that the clause, 'or until the guardian is legally discharged,' was intended to

prolong his control of the person and estate of the minor, for, if it did, he would have control for one year after the majority of the ward (Civil Code, Sec. 257), and this would be in conflict with the provisions of the Code of Civil Procedure, *supra*. Upon the minor's attaining majority, the guardian must then make a settlement either with the court or ward, and pay over and deliver to the ward all the estate in his hands, 'or due from him on such settlement.' "

A canon of statutory construction which requires that meaning shall be given to every section of a particular statute, if possible, requires us to hold that the term of the guardian's office is limited by Section 2973, Code of Civil Procedure, and that immediately thereafter the guardian shall make his final report and be discharged, and that, after the termination of his office by the restoration of the ward, the only power or authority possessed by the guardian is to make such report, and turn over to the proper person all property with which he is chargeable on such report. (*Curtis v. Devoe*, above.) This is what he and his bondsmen agree he will do, and it is clear that the law never contemplated that he might continue to exercise acts of authority and control over the property of one who had been judicially determined to be *sui juris*. Likewise, the authority of the probate court, after the order of restoration is made, is limited to requiring the guardian to make such final report, and to discharge such guardian from his trust. The legal effect of the order of sale made in this instance is that of an execution to enforce the payment of an indebtedness found to be due by the ward to his guardian upon the termination of the guardianship, and this power or authority is not possessed by a district court sitting as a court of probate. The principle would be the same if, upon the final report of the guardian, it was found that the guardian had in his possession property belonging to the ward which he was directed to turn over to the ward, but which he failed to do. We know of no process which a probate court can issue to enforce such order. The remedy is an action against the guardian, or on his official bond. (*Stumph v. Guardianship of Pfeiffer*, 58 Ind. 472.)

This court has repeatedly held that the district courts, sitting as courts of probate, are courts of special and limited jurisdiction, possessing no powers other than those expressly or by necessary implication conferred by statute. (*In re Higgins' Estate*, 15 Mont. 474, 39 Pac. 506, 28 L. R. A. 116; *State v. District Court*, 18 Mont. 481, 46 Pac. 259; *State v. District Court*, 24 Mont. 1, 60 Pac. 489; *Davidson v. Wampler*, 29 Mont. 61, 74 Pac. 82.) And such courts, in the absence of statutory authorization, have not the power to carry into effect their judgments, decrees or orders made on the final accounting of guardians, though they may possess exclusive power to compel such accounting. (Woerner's American Law of Guardianship, Sec. 110.) Likewise there is no difference, in principle, no matter what event may operate to terminate the guardianship, for, if the guardianship is actually terminated, it is quite immaterial whether it was by the restoration of the ward to capacity, or the death of the ward. The termination of the guardianship imposes the legal duty upon the guardian to make final settlement immediately after such termination, and to limit the authority of the court to requiring such settlement to be made.

A case directly analogous to the one at bar is found in *In re Livermore's Estate*, 132 Cal. 99, 64 Pac. 113, 84 Am. St. Rep. 37, where, after the ward died, the guardian secured an order for the sale of a portion of the ward's property to pay an indebtedness found due to the guardian upon final account. Respecting this order the Supreme Court of California said: "The foregoing proceeding is unique in this state, and the order made by the trial court cannot find support in the law. The title furnished to a purchaser at the sale by the deed of the guardian would not be worth a dollar. The proceedings here taken for the sale were taken under the Code provisions pertaining to guardianship matters, and, as to a sale of real estate, those proceedings only contemplate a case where there is a living ward—a living ward not only when the proceedings are inaugurated, but up to and including the moment the deed is made. When

the guardian executes the deed, he executes it for and in the place and stead of his ward, and, the moment that ward is dead, his power to execute the deed is gone. He has no more power to execute a deed under these circumstances than would an attorney in fact after the death of his principal. It is unnecessary to consider here what a court of equity might do, under the circumstances presented by the facts of this case, in aid of the probate jurisdiction of the superior court, for here the statutory procedure laid down in the Code in guardianship proceedings alone has been followed, and the sale is asked under that procedure. The guardian, as such, is attempting to make the sale, and the court is well assured it cannot be done."

In the early history of Ohio that state had a statute which authorized the court of common pleas to appoint guardians for minors, and further provided that when such minors, males, shall arrive at the age of 14 years, or females shall arrive at the age of 12 years, such minors may severally choose a guardian, such as the court shall approve. This statute was considered in *Lessees of Perry v. Brainard*, 11 Ohio, 442. The question in controversy arose as to the authority of the guardian of a female minor to sell real estate belonging to such minor. The petition for the order of sale was presented after the minor had reached the age of 12 years. In disposing of the question, the court said: "It seems to us the obvious construction of this section is, that the appointment of a guardian to a female under 12 years, though unlimited on the face of the appointment, ceases by its legal expiration when the ward arrives at the age of 12 years. At that age the law deems her of sufficient discretion and capacity to have a choice of the person who is to control not only her property but herself, subject, nevertheless, to the approval of the court; and it is then, only, after being notified to appear and make such choice, and refusal on her part, that the court are authorized and required to appoint a guardian if she is over 12 years of age. That the appointment expires by its own limitation when the ward arrives at the age of 12 years, was decided in the case of *Campbell v. English and*

*Wife*, Wright, 119. The court then held this language: 'A guardian for a female under 12 years of age continues only until the ward attains to that age. A guardian, or a man that has been a guardian, after his guardianship has expired, has no more power than if he had never been appointed.' We see no reason to question the soundness of this principle. It accords with our own views. How, then, stands the case at bar? It is admitted the guardian filed his petition for the sale of the land after the ward had arrived at the age of 12 years, and at a time when the law had determined his guardianship. All the proceedings subsequent to, and including the petition for the sale of the lot, are therefore void, and convey no title to the defendant."

In view, then, of the express declaration of Section 2973 that the restoration of the ward to mental capacity terminates the guardianship, and the further provisions of the law which are read into and made a part of the guardian's bond—that upon the expiration of his trust the guardian will settle his accounts with the court, judge or ward, and deliver over all property with which he is chargeable on such settlement—we are of the opinion that the language of Section 2972 cannot be construed to extend the guardian's authority over the person or estate of the ward beyond the time when such guardianship is terminated as provided in Section 2973. It would be an intolerable imposition upon a person *sui juris* to compel him to submit to the control of a guardian either of his person or property, and such an imposition was not intended by the law-making authority in enacting Section 2972 above.

Finally, the Codes themselves furnish us a canon of construction. Section 5165 of the Political Code provides: "If conflicting provisions are found in different sections of the same chapter or article, the provisions of the section last in numerical order must prevail, unless such construction is inconsistent with the meaning of such chapter or article." If, then, the seeming conflict between the provisions of Sections 2972 and 2973, above, is not entirely reconcilable, the provisions of Section 2973

must prevail, for there is not anything in the construction which we have given this last-mentioned section which is inconsistent with the meaning of the article in which both sections are found.

The order of sale was void, and is reversed.

*Reversed.*

MR. CHIEF JUSTICE BRANTLY and MR. JUSTICE MILBURN  
concur.

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PRYOR, RESPONDENT, v. CITY OF WALKERVILLE,  
APPELLANT.

(No. 2,923.)

(Submitted December 12, 1904. Decided January 23, 1905.)

*Review—Record — Presumptions—Waiving Objections — Instructions—Contributory Negligence—Defective Sidewalks.*

**Appeal—Transcript—Presumptions.**

1. Where the transcript upon an appeal from a judgment does not contain any testimony, bill of exceptions, or statement on motion for a new trial, it must be presumed that the evidence supported the judgment, and that the instructions were based on the testimony.

**Pleadings—Demurrers—Complaint—Waiver.**

2. Under Code of Civil Procedure, Section 685, the defendant, charging in a demurrer to a complaint that it did not state facts sufficient to constitute a cause of action, but not interposing an objection on the ground that the complaint was ambiguous and uncertain, must be deemed to have waived the latter objection.

**Pleadings Complaint—Contributory Negligence—Defense.**

3. Where the complaint, in an action to recover damages for personal injuries, does not show that plaintiff was "free from any contributory negligence," but alleges that she was injured "without any fault or negligence on her part," the existence of contributory negligence is a matter of defense.

**Judgments—Erroneous Instructions—Transcript—Evidence—Appeal.**

4. A judgment attacked upon the ground that the instructions were erroneous, will not be disturbed, where the transcript does not contain any of the evidence, unless the instructions would have been erroneous under every conceivable state of facts.

**Personal Injuries—Sidewalks—Instructions—Harmless Error.**

5. The giving of instructions, in an action for damages for personal injuries resulting from a defective sidewalk, which misnamed the street where the accident was alleged to have occurred, will not justify the reversal of a



judgment in favor of plaintiff, where it appears that the rights of appellant were not prejudiced by such obvious mistake or clerical error.

Instructions—How to be Construed.

6. Instructions must be construed as a whole in their relations to the pleadings and testimony.

Complaint—Verification—Objections—When to be Made—Appeal.

7. An objection to the verification of a complaint cannot be made for the first time in the appellate court.

*Appeal from District Court, Silver Bow County; E. W. Harney, Judge.*

ACTION for personal injuries by Sarah A. Prior against the city of Walkerville. From a judgment for plaintiff, defendant appeals. Affirmed.

*Mr. Chas. O'Donnell, for Appellant.*

It was incumbent on the plaintiff to allege and prove that she was in the exercise of ordinary and proper prudence in going across the sidewalk, and was thus free from any contributory negligence. (*Kennon v. Gilmer*, 4 Mont. 435; *Shearman and Redfield on Negligence*, Secs. 34, 281, and cases cited; *Taillon v. Mears et al.*, 74 Pac. 421; *Wall v. Helena Street Railway Company*, 12 Mont. 44; *Nelson v. City of Helena*, 16 Mont. 21; *Prosser v. M. C. Ry.*, 17 Mont. 372; *Cummings v. H. & L. S. & R. Co.*, 26 Mont. 434.)

Instructions as a whole must be consistent, and not misleading. (*Hoben v. Burlington & Missouri R. R. Co.*, 20 Iowa, 562.) It is erroneous to give instructions which are contradictory and irreconcilable. (*Kraus v. Haas*, 6 Texas Civ. App. 665; *Henschen v. O' Bannon*, 56 Mo. 289; *House v. Fultz*, 13 Smedes and M. (Miss.) 39; *Kelly v. Cable Co.*, 7 Mont. 70; *Comstock v. Smith*, 26 Mich. 306; *Lake Shore & M. S. R. Co. v. Miller*, 25 Mich. 274; *Hart v. Chicago, R. I. & P. R. Co.*, 56 Iowa, 166; *Pumphrey v. Walker*, 75 Iowa, 408; *Anderson v. Oscamp*, (Ind. App.) 35 N. E. 707; *Blashfield on Instructions*, Sec. 73, and other cases in notes.) The verification to the complaint was not sufficient. See Code of Civil Procedure, Laws of Montana, Sec. 3463.

*Mr. John J. McHatton*, for Respondent.

The matter of contributory negligence is one of defense, and the question of whether or not contributory negligence existed is one for the jury, unless, of course, it appears from the statements of plaintiff in her complaint or from plaintiff's testimony that she was guilty of contributory negligence. (*Snook v. City of Anaconda*, 26 Mont. 128, 137; *Mulrille v. Pacific Mutual Life Ins. Co.*, 19 Mont. 95; *Higley v. Gilmer*, 3 Mont. 90.)

There being no testimony in the record, the instructions cannot be considered. (*Gum v. Murray*, 6 Mont. 10; *State v. Gill*, 21 Mont. 151; *State v. Gawith*, 19 Mont. 48; *Territory v. McAndrews*, 3 Mont. 158, 162.) It is the duty of counsel to call to the attention of the court, before the instructions were given to the jury, any inaccuracies, mistakes or insufficient statements contained in any of the proposed instructions; and if he does not do so, he cannot thereafter complain. (*Butte & Boston Min. Co. v. Lexington*, 23 Mont. 177, 199; *Mulligan v. Montana Union Ry. Co.*, 19 Mont. 135, 141; *State v. Broadbent*, 19 Mont. 467, 473; *Hamilton v. Great Falls St. Ry. Co.*, 17 Mont. 334, 346; *People v. Wallace*, 109 Cal. 611; *Sioux City, etc. Ry. Co. v. Finlayson*, 16 Neb. 578, 20 N. W. 860.)

A mere clerical error and misnomer of the street upon which the accident is alleged to have occurred, in an instruction is not ground for reversal. (*Ashton v. Zelia Min. Co.*, (Cal.) 66 Pac. 494; *Illinois Steel Co. v. Hanson*, (Ill.) 62 N. E. 918; *Equitable, etc. Co. v. Milligan*, (Ind.) 65 N. E. 1044; *Davis v. Judd*, 11 Wis. 11; *O'Callaghan v. Bode*, 84 Cal. 489, 24 Pac. 269; *Mann v. Higgins*, 83 Cal. 66, 23 Pac. 206; *O'Connor v. Langdon*, 2 Idaho, 803, 26 Pac. 659; *Southern, etc. Co. v. Jordan*, (Ga.) 13 S. E. 202; 11 Ency. Pl. and Pr. 136.)

MR. COMMISSIONER BLAKE prepared the opinion for the court.

This action was commenced to recover damages for personal injuries sustained through the alleged negligence of defendant

—a municipal corporation under the laws of the state—to keep in good repair a certain street and sidewalk. The defendant appeals from a judgment entered upon a verdict for plaintiff. The transcript does not contain any testimony, bill of exceptions, or statement on motion for a new trial. It must be presumed that the evidence supports the judgment, and that the instructions are based upon the testimony. (*Beatty v. Murray Placer M. Co.*, 15 Mont. 314, 39 Pac. 82.)

The appellant contends that the complaint does not state facts sufficient to constitute a cause of action, and the demurrer specifying this ground was overruled by the court below. The pleader followed substantially the forms prescribed in actions of this class, and we think counsel for appellant has placed a forced construction upon the paragraphs he attacks. If the argument upon the allegations respecting the cause and locality of the accident resulting in the injuries to plaintiff were sound, it might be decided that the complaint is ambiguous and uncertain. No objection was taken upon this ground, and defendant "must be deemed to have waived the same." (Code of Civil Procedure, Sec. 685.)

It is claimed that there should have been an averment in the complaint that plaintiff was "free from any contributory negligence," but this question has been settled by this court after a thorough review of the authorities. It is alleged, however, that plaintiff was injured "without any fault or negligence on her part," and it is held, under similar pleadings, that contributory negligence is a matter of defense. (*Prosser v. Montana Central R. Co.*, 17 Mont. 372, 43 Pac. 81, 30 L. R. A. 814; *Snook v. Anaconda*, 26 Mont. 128, 66 Pac. 756; *Ball v. Gussenhoven*, 29 Mont. 328, 74 Pac. 871.) The appellant seems to have entertained this view, and says in the answer that "plaintiff was guilty of contributory negligence in going upon said public thoroughfare and leaving said sidewalk, and, if plaintiff received any injury on said thoroughfare, it was wholly due to her own fault and negligence." We are unable to see any error in overruling the demurrer.

The appellant maintains that the instructions are erroneous, but, in the absence of the evidence, we must apply the rule announced in *State v. Mason*, 24 Mont. 340, 61 Pac. 861, wherein the court approves the doctrine of the Supreme Court of the State of California in holding that a judgment attacked upon this ground will not be disturbed unless it appears that the instructions "would have been erroneous under every conceivable state of facts." With this observation, the objections of appellant to most of the instructions may be dismissed.

There is one matter for our consideration—a mistake in the name of a street in said city of Walkerville, appearing in instructions numbered 3 and 10, given at the request of respondent.

Instruction No. 3: "If you find from the evidence in this case that the sidewalk mentioned and described in plaintiff's complaint herein, upon the west side of Daly street, within the limits of the city of Walkerville, was constructed," etc.

Instruction No. 10: "The defendant, by its answer in this case, admits and pleads that there was no sidewalk along the west side of Daly street at the time mentioned in plaintiff's complaint herein, and that the same was a public highway." etc.

The third paragraph of the complaint alleges: "That among other streets in the said city upon which it became the duty of the said defendant to maintain a safe and suitable sidewalk is Main street running southerly from Daly street, in the said city, and that the defendant, disregarding its duties in that behalf, did negligently and knowingly allow a portion of the said sidewalk on the westerly side of the said street to be out of repair and unsafe and dangerous," etc. This is the sole reference in the complaint to the names of these streets, and the word "Daly," in the above instructions, was used instead of "Main."

The answer denies "that it became the duty of said defendant to maintain a safe and suitable sidewalk on Main street, running south from Daly street, in the said city. \* \* \*

Denies that defendant negligently or knowingly allowed a portion of said sidewalk on the westerly side of said street to be out of repair or unsafe or dangerous."

The first instruction is a statement of the facts pleaded in the complaint, and describes "Main street, running south from Daly street." The second instruction says that "Main street, described in plaintiff's complaint herein, is a public street and thoroughfare within the limits of the defendant city of Walkerville." The eleventh instruction refers to the "thoroughfare mentioned in the complaint herein, and called 'Main street.'" The fifth instruction requested by defendant tells the jury that if plaintiff "fell down [on] the side of the said highway near the Chinese washhouse, and on the south side of Blither's house, and if you further find that the said plaintiff did not fall off the sidewalk, as alleged in her complaint, then you shall find for the defendant." The ninth instruction requested by defendant is as follows: "The court instructs you that if you find from the evidence that the said plaintiff fell from the highway in front of the Chinese washhouse, and not from the sidewalk, as alleged in the plaintiff's complaint, then you shall find for the defendant." The instructions, through this inadvertence, are somewhat contradictory and inconsistent, and their effect upon the issues before the jury must be decided.

In *Shortel v. St. Joseph*, 104 Mo. 114, 16 S. W. 397, 24 Am. St. Rep. 317—a suit to recover damages for personal injuries—the court said: "The defendant's first instruction uses in one place the word 'plaintiff' when it should be 'defendant,' and in another place the word 'defendant' when it should be 'plaintiff'; still these are mere clerical errors readily discovered upon reading the instructions, and constitute no ground whatever for a reversal."

In *Harris v. Daugherty*, 74 Tex. 1, 11 S. W. 921, 15 Am. St. Rep. 812, the court said: "We see nothing in the matter complained of in the twelfth assignment of error which could have operated to the prejudice of appellant. In his charge to the jury, in stating the issues, the judge, by evident inadvert-

ence, used this language: 'The defendant also denies that Slaughter was a creditor of said Daugherty at the time Slaughter transferred the property to him.' The court meant to use the word 'debtor' instead of 'creditor.' It is evident no harm could have resulted from the mistake."

In *Schatzlein Paint Co. v. Passmore*, 26 Mont. 500, 68 Pac. 1113, this court said: "The instructions of which complaint is made are doubtless open to objection on the score of inaccuracy, but it is clear that error prejudicial to the defendant did not result therefrom."

It is a general rule that all the instructions must be construed as a whole in their relations to the pleadings and testimony. We have concluded that the instructions are reconcilable, and therefore, we must presume, were rightly understood by the jury, and that the obvious mistake regarding the names of Daly and Main streets in said instructions numbered 3 and 10 did not prejudice the rights of appellant.

The verification of the complaint is signed by "Sarah A. Pryor (her X mark)," and appellant claims that the signature of plaintiff should have been witnessed by a person writing his own name. (Code of Civil Procedure, Sec. 3463.) This objection was not made in the court below, and cannot be heard in this court for the first time. (*Power v. Gum*, 6 Mont. 5, 9 Pac. 575; *San Francisco v. Itsell*, 80 Cal. 57, 22 Pac. 74.)

We recommend that the judgment be affirmed.

PER CURIAM.—For the reasons stated in the foregoing opinion, the judgment is affirmed.

*Affirmed.*

IN RE COURTNEY'S ESTATE.  
COURTNEY, APPELLANT, v. DALY BANK & TRUST CO.  
OF BUTTE, ET AL., RESPONDENTS.

(No. 2,057.)

(Submitted December 27, 1904. Decided January 25, 1905.)

*Executors — Removal — Incompetency—Report of Referee—  
Disapproval—Appeal—Presumptions.*

**Executors—Removal—When Proper.**

1. Under Code of Civil Procedure, Section 2434, the court properly removed an executor who was palpably deficient in the understanding necessary to enable one to transact business, who made no sufficient effort to collect the debts due the estate, who never read and did not know the contents of affidavits attached to his report, who was ignorant of his personal business relations with the decedent whose estate he was administering, and who, in short, was incompetent because incapable.

**Executors—Accounts—Referees—Reports—Advisory Only.**

2. The report and findings of a referee, appointed for the purpose of examining the account of an executor, hearing the objections thereto and making report thereon, are merely advisory to the court, and may be adopted, modified, or disapproved, as the court sees fit; and the court may, if it so desires, take further testimony, and make findings of its own on which to base its orders.

**Executors—Compensation—Settlement of Accounts—Presumption.**

3. On appeal from an order settling the semi-annual account of an executor and from an order revoking his letters, it will be presumed, in the absence of anything in the orders on the subject, that upon a final settlement of the estate the proper compensation will be allowed to the executor for his services.

*Appeal from District Court, Silver Bow County; John B. McClernan, Judge.*

IN THE matter of the estate of Thomas F. Courtney, deceased. From an order revoking letters testamentary granted to Dennis C. Courtney, and from an order settling the semi-annual account of said Courtney, he appeals. Affirmed.

*Mr. C. P. Connolly, and Mr. George F. Shelton, for Appellant.*

Letters testamentary will not be revoked because of any error of judgment on a doubtful question or mistake of the executor

as to his legal rights. (*Sparrow's Succession*, 39 La. Ann. 696; *Gray's Estate*, 4 Kulp (Pa.) 157.) Acts done in good faith under advice of counsel do not furnish grounds for revoking letters of administration. (*Loxley's Estates*, 14 Phil. (Pa.) 137.) A merely technical maladministration will not authorize the revocation of letters testamentary, but it must be such as involves actual injury, or reasonable apprehension of injury, or is attended with circumstances indicative of fraud. (*Killam v. Costly*, 52 Ala. 85.) There should be undoubted proof of the utter improvidence and unfitness of an executor for the duties of his trust to justify his removal. (*Matter of Joseph*, 15 N. Y. St. Rep. 752; *Cotterell v. Brock*, 1 Bradf. 148.)

Before a creditor can have an executor or administrator removed, he must allege and show that he has been injured by the maladministration complained of. (1 Woerner, Adm'r, p. 577, Sec. 271, and p. 580, Sec. 272; *Succession of De Cuir*, 23 La. Ann. 166.) An executor may commit errors in his accounts or make mistakes in his construction of the will. These the court will correct, but will not remove the executor unless there is wilful misconduct, waste or improper disposition of the assets. (1 Woerner, star page 580; *Witherspoon v. Watts*, 18 S. C. 396; *Carpenter v. Gray*, 32 N. J. Eq. 692; *McFadgen v. Council*, 81 N. C. 195.)

*Mr. A. J. Campbell, Mr. Roy S. Alley, and Mr. Bernard Noon*, for Respondents.

The retention of any portion of money received for the estate by the executor amounted to a mismanagement of the estate. (Statute of Frauds, Sec. 2340, C. C. P. of Montana; Sec. 1551, C. C. P. of Montana, on Question of Gift; *Vogel v. Gast*, 20 Mo. App. 104; *In re Summerville*, 20 N. Y. Supp. 76; *Minns v. Ross*, 42 Ga. 121; *Danbenspeck v. Biggs*, 71 Md. 225; *Merritt v. Merritt*, 9 Ky. Law Repts. 721; *Bogan v. Finley*, 19 La. Ann. 94; *Tillman v. Mosley*, 14 La. Ann. 710; *Frost v. Admr.*, 33 Vt. 639; *Bigelow v. Payton*, 4 Mich. 170; *Spencer v. Vance*, 57 Mo. 427; *Blasdel v. Lock*, 52 N. H. 238.)



MR. JUSTICE MILBURN delivered the opinion of the court.

This matter is before us on appeal from an order of the district court revoking the letters testamentary one time issued to the appellant in the matter of the last will and testament of Thomas F. Courtney, deceased, and from the order made on the 1st day of December, 1903, settling the semi-annual account of the said executor. Objections having been made by the respondent, the Daly Bank & Trust Company, to the report and account of the executor, the matter was referred to a referee, who made his report and recommendations. These were disapproved and set aside by the court. It revoked the letters testamentary, appointed Thomas S. Hogan special administrator, and ordered all property remaining in the hands of the executor to be turned over to the special administrator. The court, in its order removing the executor, found that the said Dennis C. Courtney was incompetent to act as executor.

The ten errors of law assigned can be reduced to three: First, that the court erred in revoking the letters testamentary; second, that the court erred in settling the account of Dennis C. Courtney, in that it refused to allow a certain item therein, to-wit, "Money received since last report, to-wit, lease money not previously reported, \$1,199.28"; and, third, that the court erred in setting aside the report of the referee, Forestell, "and in proceeding to take testimony upon the same, after it had been submitted to the court for approval."

The court, in its decree, states that it found the said Dennis C. Courtney to be incompetent to act as executor, and, further, that he had mismanaged the affairs of the estate. To cite, even from the testimony given by the appellant himself before the court, all the evidence going to show conclusively that he is a man incompetent to attend to his own business or the business of other people, would be to consume more time and space than we need to use. His own statements prove that he did not know anything whatever definite about his own personal business re-

lations with his brother—he claiming to have advanced him large sums of money from time to time, which had not been accounted for—or the business of his brother with other persons, or the amount of money due the estate. It also appeared that he had not made any sufficient effort to collect debts said to be due the estate, or to find out whether in fact they were valid claims of the deceased against the alleged debtors.

Appellant contends that the court erred in holding that appellant was incompetent to act as executor, and that the evidence was insufficient to sustain a finding of incompetency, in this: that, in order to sustain such a finding, it was necessary that evidence should have been adduced showing or tending to show that the executor was under the age of majority, or convicted of an infamous crime, or adjudged by the court or judge incompetent to execute the duties of the trust by reason of his drunkenness, improvidence or want of understanding or integrity (Section 2434, Code of Civil Procedure); and, further, that there was not any evidence whatever showing or tending to show any such facts adduced at the hearing or before the court.

While it does not appear that the executor was guilty of willful wrong, a very casual perusal of the evidence produced at the hearing will show that there was, and has been all along, a very grave and palpable want of understanding on his part, and that he is for that reason incompetent, because he is incapable. Reference to any standard dictionary as to the meaning of the word "improvidence," as used in the section cited, with a slight consideration of the evidence adduced, will show that improvidence is characteristic of the executor. On the witness stand he testified that he never read the affidavits attached to his reports, and from his testimony it is evident that he did not know what they contained. The court would have been very derelict in its duty, especially considering the large number of claims against the estate as shown by the record, if

it had allowed the appellant to remain in his responsible position.

So far as the disallowance of the \$1,199.28 is concerned, the court was correct in its ruling disapproving the item. It is shown by the evidence that the decedent in his lifetime received a "political lease" of a part of the Colusa-Parrot mine, and that decedent desired the fact to remain secret. There was not any record of this lease. It never was evidenced by writing. It seems that while the decedent was a state senator in the Seventh Legislative Assembly he was told he could have this lease. The executor claims to have been told by the decedent that he (Dennis) should have one-half of the interest of the decedent in the lease; Thomas F. Courtney apparently having permitted one or two others to have a third interest therein. In the inventory there is not any mention made of this asset, or of any of the money received therefrom. It seems that \$7,342.90 was paid by the smelter people to the lessees for ores. The executor did not make any effort whatever to find out whether this amount was correct or not, and very apparently he does not know anything about it. There was paid to him as money actually received by the executor on account of the lease, which is variously stated by him one time to have been \$2,034, and at another \$2,074. This money he kept in his house for about a year, and then gave it to his wife, and allowed her to deposit it in bank in her own name, and then undertook to account for \$1,199.28 of it as being one-half of the two-thirds of the lease money which he had received, having theretofore stated to the court that his reports and inventory were correct, they omitting any reference to the lease or any proceeds therefrom. There was a settlement with one Kilgallon, so it appears from the evidence, wherein he was paid one-third of the sum of \$7,342.90, the proceeds of the mine less certain expense money. The settlement is unique in that it only charges one-third of the expense for labor, etc., against the gross receipts of \$7,342.90, and then divides the remainder by three, in order to arrive at the interest of Kilgallon, he claiming a one-third interest in the

lease; thus making Mr. Kilgallon a present of a large sum of money, in that all the expenses were not charged up against the latter before division was had. The court was correct in disallowing the item, as we have said above, and the matter of this lease should be thoroughly investigated by the court and its officer, the administrator, to the end that a correct statement of the facts may be made.

The court did not err in setting aside the report of the referee, which recommended that the report and account of the executor be approved except as to the item of \$1,199.28, and that the executor be not removed; suggesting to the court further that the executor be charged in the account with the sum of \$1,303.60, instead of \$1,199.28, as received on account of said lease. The report and findings of a referee may be adopted, modified or disapproved altogether, as the court may see fit, where the reference was only for the purpose, as in this case, of examining the account of the executor and the objections thereto and making "report thereon." The court, not being satisfied from the evidence adduced before the referee that the findings and recommendations of the referee were correct and proper, took further testimony, and made its own findings and conclusions, and the two orders from which the appeals have been taken. As we have said heretofore, the action of the court in making the orders was correct, and, considering what we have already said as to the incompetency and improvidence of the executor, the court, not being satisfied with the findings and recommendations of the referee, did not err in setting aside the findings of the referee in the premises. The report of the referee was merely advisory to the court. (*Murphy v. Patterson*, 24 Mont. 575, 63 Pac. 375, and cases cited.)

The point is made in the brief of counsel for the appellant that the executor seems to have been deprived of any compensation for services that may have been rendered by him as executor. There is not anything said upon this subject in either one of the two orders of the court appealed from. It is, of course, to be presumed that upon a final settlement of the estate the

proper compensation will be allowed to all the executors and administrators who have taken or may take part in the administration of the estate, and, if anything is due to Mr. Courtney at that time, the court will make the proper award to him. The orders appealed from are affirmed.

*Affirmed.*

MR. CHIEF JUSTICE BRANTLY and MR. JUSTICE HOLLOWAY  
CONCUR.

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SPENCER, RESPONDENT, v. SPENCER, APPELLANT.

(No. 2,011.)

(Submitted November 16, 1904. Decided January 25, 1905.)

*Wills—Probate—Revocation — Contest—New Trial—Instructions—Judgment Roll—Special Findings—Dissenting Jurors—Opinion Evidence.*

**Wills—Probate—Settlement of Estates—Statutes.**

1. The probate of wills and the settlement of estates are not governed by the general law relating to actions, proceedings and judgments, but are, in the main, provided for by statute, and, in so far as the statute has spoken, its declarations are final.

**Wills—How Contested and Set Aside.**

2. Where there is a proper subject-matter, neither the order admitting a will to probate, nor the order of final distribution, is void, and neither can be contested or set aside except in the manner and within the time fixed by statute.

**Wills—Contests—In Whose Favor Operative.**

3. The successful contest of a will, after probate and distribution of the estate, by a minor on coming of age, operates only in his favor, and not in favor of those heirs who have lost their right to contest by a failure to institute proper proceedings within the time allowed by Section 2366 of the Code of Civil Procedure.

**Executors—Distribution—Acquiescence—Estoppel.**

4. An heir who has acquiesced in the settlement and final distribution of an estate, is estopped to call such settlement and distribution in question, or to compel the return of, or an accounting for, the property thus parted with by the executor or administrator in good faith.

**New Trial—Newly Discovered Evidence—Affidavit.**

5. Refusal of new trial, asked for on the ground of newly discovered evidence, is not error, in the absence of an affidavit showing that the evidence was not known to movant at the time of the trial.

**Instructions—Judgment Roll—Appeal.**

6. Unless instructions given, and those requested and refused, are made part of the judgment roll, they will not be considered on appeal.

**Jury—Findings—Dissenting Jurors—Affidavits.**

7. Special findings acquiesced in by the required two-thirds of a jury may not be set aside by reason of affidavits made by dissenting jurors that, in their opinion, the conclusion of the majority was reached by giving a wrong construction or too much weight to a part of the evidence.

**New Trial—Jury—Fraud—Undue Influence—Evidence.**

8. In the absence of a statute, and in order to secure freedom of thought, thorough discussion, and independence of action, as well as to prevent undue influence and fraud, the construction or weight given by the jury to evidence submitted to it, is not a subject of inquiry upon a motion for a new trial.

**Findings—Issues—Harmless Error.**

9. The submission of issues not raised by the pleadings is harmless, when the findings thereon, in view of the authorized findings, are immaterial, so far as the ultimate rights of the parties are concerned.

**Verdict—Findings—Evidence—Conflict—Appeal.**

10. Where there is a substantial conflict in the evidence a verdict or finding will not be disturbed on appeal.

**Wills—Insanity—Non-Expert Witness—Opinion Evidence.**

11. A non-expert witness, who detailed the circumstances relative to the mental condition of the testator for six months prior to the date of the will, upon which he based his conclusion that the decedent was not mentally competent to make a will, may give his opinion as to testator's competency.

**Court Records—Best Evidence—Former Action.**

12. The court records are the best evidence on the question of the disposition of a former action or proceeding.

*Appeal from District Court, Deer Lodge County; Welling Napton, Judge.*

WILL CONTEST by James R. Spencer against John C. Spencer and John G. Porter. Judgment in favor of plaintiff. Defendants appeal from the judgment and from an order denying their motion for a new trial. Modified and affirmed.

*Mr. W. E. Carroll, and Mr. E. Scharnikow, for Appellant.*

A devisee is estopped to set up invalidity of will, when she has received and receipted for her share. (*Lilly v. Townsend*, 110 Mich. 253, 68 N. W. 136.) A decree setting aside the probate of a will at the suit of an heir arrived at full age, will not inure to the benefit of other heirs who permit the time allowed them for objection to such probate to pass without instituting a contest thereof. (*Samson v. Samson*, 64 Cal. 327, 30 Pac.

978; *Thompson v. Samson*, 64 Cal. 330, 30 Pac. 980; *Couts Estate*, 100 Cal. 400, 34 Pac. 865; *Rowland's Estate*, 74 Cal. 523, 16 Pac. 315, 5 Am. St. Rep. 464.)

Proof of testamentary incapacity must be reasonably certain and established by positive evidence. (*Chase v. Winans*, 59 Md. 475; *Grubbs v. McDonald*, 91 Pa. St. 236.) The real question involved in the issue as to testamentary capacity is whether or not the testator, at the time of making the instrument purporting to be his will, had such mind and memory as to enable him to understand the particular business in which he was engaged. (*Smith v. Henline*, 174 Ill. 184, 51 N. E. 227; *Von DeVeld v. Judy*, 143 Mo. 348, 44 S. W. 1117; *Cash v. Lust*, 142 Mo. 630, 44 S. W. 724; *Roller v. Kling*, 150 Ind. 159, 49 N. E. 948; *Riley v. Sherwood*, 144 Mo. 354, 45 S. W. 1077; *Delaney v. Salina*, 34 Kan. 532; *Hubbard v. Hubbard*, 7 Ore. 42.)

On an issue as to mental capacity of a person, a lay witness cannot testify whether, in his opinion, he was rational or irrational, but must state the facts within his actual knowledge of the acts and conversations of such person, and then may say whether, in his judgment, such acts and conversations were those of a rational or irrational person. (*Paine v. Aldrich*, 133 N. Y. 544, 30 N. E. 725; *Holcomb v. Holcomb*, 95 N. Y. 316; *Johnson v. Cochrane*, 91 Hun. 165, 36 N. Y. Sup. 283; *Clapp v. Fullerton*, 34 N. Y. 190; *Prather v. McClelland*, (Tex.) 26 S. W. 657.)

A witness may not be permitted to answer a question as to condition of decedent six months before the date of execution of the will, it not being a part of the *res gestae*. (*Pierce v. Pierce*, 38 Mich. 412; *Runyan v. Price*, 15 Ohio St. 1; *Ellis v. Ellis*, 133 Mass. 469; *Legg v. Myer*, 5 Redf. 628; Sec. 3126, Code of Civil Procedure.) A witness cannot be asked his "opinion as to the capacity of a testator to make a will." (*Runyan v. Price*, 15 Ohio St. 1, 86 Am. Dec. 459; *Hall v. Perry*, 87 Me. 569, 33 Atl. 160; *May v. Bradlee*, 127 Mass. 414.) Where some of the material findings are against evidence, and

others unsatisfactory or contradictory, it raises a presumption that the jury were influenced by prejudice or mistake, and a new trial should be granted. (*So. Kan. Ry. v. Michaels*, 49 Kan. 388, 30 Pac. 408; *Bagley v. Eaton*, 8 Cal. 159; *Roach v. Gilmer*, 3 Utah, 389, 4 Pac. 221; *Estate of Wilson*, 117 Cal. 262.)

Misconduct of jurors antecedent to the weighing of testimony is sufficient to authorize the granting of a new trial. (*Kruidniet v. Shields*, 70 Iowa, 428, 30 N. W. 681.)

*Mr. O. J. Saville*, for Respondent.

The decree of distribution operated as a judgment *in rem*, and could not be reopened, modified or set aside by any subsequent judgment which might be rendered in this cause. (*Black on Judgments*, Ed. of 1891, Vol. 2, Sec. 643; *Kearney v. Kearney*, 72 Cal. 591; Code of Civil Procedure, Sec. 2844.)

The supreme court can modify the judgment of the lower court on appeal, when the facts are before it, and justice can be done between parties. (*Gans v. Woolfolk*, 2 Mont. 458; Code of Civil Procedure, Sec. 21.)

Motions for a new trial on the ground of newly discovered evidence are regarded with distrust and disfavor, and the strictest showing of diligence and all other facts necessary is required. The moving party must show by his own affidavit that he did not know of this evidence and could not by exercise of due diligence have obtained it at the former trial. In order that such evidence may be considered upon the application for a new trial, it is necessary to be shown that the newly discovered evidence is not simply cumulative, that it is not to impeach an adverse witness, that it is material and is so important that it would probably change the verdict had it been in on the former trial. (*Bartlett v. Hodgen*, 3 Cal. 56; *Baker v. Joseph*, 16 Cal. 173; *Arnold v. Scaggs*, 35 Cal. 684; *Stoakes v. Monroe*, 36 Cal. 383; *People v. Ah Ton*, 53 Cal. 741; *Martin v. Hazard Powder Co.*, 2 Colo. 596; *Wilson v. Waldron*, 12 Wash. 149, 40 Pac.



746; *Ott v. Anderson*, 61 Pac. 330, 9 Kan. App. 320; *Kloppenstine v. Hays*, 57 Pac. 712, 20 Utah, 45.)

There being a substantial conflict in the testimony upon a given point, this court has no power to disturb the findings thereon. It can not try the case *de novo*, and thus invade the province of the trial court and jury, by passing upon disputed questions of fact, and the credibility of witnesses.. (*Nelson v. G. N. Ry. Co.*, 72 Pac. 642, and cases therein cited; *Babcock v. Maxwell*, 74 Pac. 64; *Ball v. Gussenhoven*, 74 Pac. 871.)

Affidavits of jurors are inadmissible to impeach their verdict, except where it was arrived at by a resort to the determination of chance. (*Hayne's New Trial and Appeal*, Sec. 73; *Fredricks v. Judah*, 15 Pac. 305; *Griffiths v. Montandon*, (Idaho) 39 Pac. 548.) Affidavits of dissenting jurors are not competent evidence to show misconduct. (*Saltzman v. Telephone Co.*, 58 Pac. 169, 125 Cal. 501.)

MR. COMMISSIONER POORMAN prepared the opinion for the court.

This is an appeal from a judgment and decree revoking the probate of a will, and from an order overruling a motion for a new trial.

James M. Spencer died in Deer Lodge county, Montana, October 12, 1891, leaving surviving him his widow, Fanny Spencer, his only daughter, Jane Porter, and his two sons, John C. and James R. Spencer. Afterwards a paper bearing date September 22, 1891, and purporting to be the last will and testament of said James M. Spencer, was offered for probate; and on December 5, 1891, an order of court was made admitting the same to probate, and appointing John C. Spencer executor thereof. At the time of the death of James M. Spencer all the children were over the age of twenty-one years, except James R. Spencer, who was born November 8, 1878. Under the terms of this alleged will, \$5 were bequeathed to James R. Spencer, \$5 to Jane Porter, and all the rest, residue and remainder of the estate was bequeathed to the widow, Fanny Spencer, and the

elder son, John C. Spencer, to be equally divided between them. The estate was administered in accordance with the terms of this alleged will, and the executor was finally discharged from his said trust in 1894.

The validity of the will was not questioned by any one until James R. Spencer, having attained his majority, and within one year thereafter, filed his petition contesting the will, and, as appears from the amended petition on which the case was tried, limiting the contest to two grounds: (1) Lack of mental capacity; and (2) fraud, menace and undue influence of John C. Spencer. The answer put in issue the facts stated in the petition, and alleged the due execution of the will. The case was tried to a jury, which returned findings to the effect (a) that James M. Spencer on the 22d day of September, 1891, did not have sufficient mental capacity to make a testamentary disposition of his property; (b) that he did not have sufficient physical strength to execute a will; (c) that he did not subscribe his name at the end of the instrument offered for probate; (d) that he did not acknowledge to the subscribing witnesses that his signature to the will was made by himself or by his authority; (e) that he did not declare to such witnesses that the instrument was his will; (f) that said witnesses did not sign their names to the instrument at the request of James M. Spencer; (g) that James M. Spencer was not on that day acting under duress, menace, fraud or undue influence of John C. Spencer. The court adopted these findings of the jury, and entered a decree setting aside the probate of the will, revoking the letters testamentary theretofore issued to John C. Spencer, and ordered letters of administration to be issued upon said estate to Fanny Spencer.

1. The appellant contends that the court erred in holding the former proceedings void *in toto*, and maintains that the probate of the will and the final order of distribution may not, in any event, in this proceeding, be set aside, except in so far as the rights of the contesting heir are concerned. The probate of wills and the settlement of estates are not governed by the

general law relating to actions, proceedings and judgments, but are, in the main, provided for by statute; and, in so far as the statute has spoken, its declarations are final. The doctrine of the indivisibility of judgments, discussed and considered in *Wells v. Wells et al.*, 144 Mo. 198, 45 S. W. 1095, does not apply.

Section 2366 of the Code of Civil Procedure provides: "If no person, within one year after the probate of a will, contest the same or the validity thereof, the probate of the will is conclusive; saving to infants and persons of unsound mind, a like period of one year after their respective disabilities are removed." The language of this statute is too plain to require either interpretation or construction. If the heir voluntarily permitting the time allowed by law to contest a will to elapse without making any objection, can profit by a successful contest instituted by one whose time has not elapsed, he accomplishes by indirection that which the law forbids him to do directly, and reopens a controversy which the statute says is concluded. As was said in *Thompson v. Samson*, 64 Cal. 330, 30 Pac. 980, in considering this identical question: "The result of sustaining this proposition is, of course, to hold that no purchaser at an executor's sale, and no purchaser from any heir, legatee or devisee, made even after final distribution, can ever be secure in his purchase until the expiration of one year after every infant and person of unsound mind who may be interested in the estate shall have been relieved of their respective disabilities."

Our statute saves to persons not *sui juris* one year after the removal of their disabilities within which to contest the probate of a will. It also provides for the probate of a document purporting to be the will of a deceased person, for the hearing of the petition, the establishment of the will by proper proof, and the administration and final distribution to the persons entitled thereto. And such order and final distribution "is conclusive as to the rights of heirs, legatees or devisees, subject only to be reversed, set aside or modified on appeal." (Sections 2844, 3196, Code of Civil Procedure.) All these statutes must be construed together.

Where there is a proper subject-matter, neither the order admitting a will to probate nor the order of final distribution is void, and neither can be contested or set aside except in the manner and within the time fixed by statute; nor can one against whom by lapse of time these proceedings have become "conclusive" avail himself of proceedings instituted and carried to a successful conclusion by one against whom the limitation has not run.

Furthermore, an heir who has acquiesced in the settlement and final distribution of an estate in a certain manner is estopped afterwards to call this settlement and distribution in question, and to compel the return of, or an accounting for, the property thus parted with by the executor or administrator in good faith, and with the acquiescence and sanction of the heir; and this principle would apply if there were no will at all. On the subject of estoppel, see *Lilly v. Townsend*, 110 Mich. 253, 68 N. W. 136.

*Samson v. Samson*, 64 Cal. 327, 30 Pac. 979, is based on a similar state of facts as that here presented, and involves the construction of Sections 1333 and 1666 of the California Code of Civil Procedure, which are substantially the same as Sections 2366 and 2844, respectively, of the Montana Code of Civil Procedure. The court in that case held that a decree annulling a will upon an application made by a minor heir operates upon the interests of the applicant only. It does not act in favor of those heirs who have lost their right to contest the will by the lapse of time. The decree of the district court in the *Samson Case* was to the effect that the entire proceedings under the will were void. The supreme court ordered the case returned to the district court with instructions to modify the judgment in accordance with the views expressed in its opinion.

2. One of the grounds stated in the motion for a new trial was newly discovered evidence, and affidavits were filed in support of this contention. All of the evidence contained in the affidavits relates to the mental and physical condition and sobriety of the testator, and was all cumulative evidence, except,

possibly, the affidavit of Dr. Whitford, which related to the effect of a gunshot wound received by the testator several years prior to his death. The record, however, contains no affidavit by appellant that he did not know of this so-called newly-discovered evidence at the time of the trial, and the district court did not err in refusing to grant a new trial on this ground. (*Nicholson v. Metcalf*, 31 Mont. 276, 78 Pac. 483, and cases cited; *Smith v. Shook*, 30 Mont. 30, 75 Pac. 513.)

3. Objections are made to certain instructions given, and to the action of the court in refusing to give other instructions requested by appellant. None of the instructions given or requested appear in the judgment roll. It is the settled practice in this state that instructions given and those requested and refused are a part of the judgment roll, and, unless they come up as such, they will not be considered. (Session Laws 1901, p. 160; see cases cited in *Shropshire v. Sidebottom*, 30 Mont. 406, 76 Pac. 941.)

4. It appears that some of the special findings were acquiesced in by only nine of the jurors. Two of the dissenting jurors filed affidavits to the effect that some of the other jurors assented to the findings on the ground that the residence address of one of the subscribing witnesses to the will was not in the same handwriting as the signature of such witness, and was in the same handwriting as the body of the will. The will had been put in evidence, and was taken by the jury to its room. In this state two-thirds of a jury in a civil action may agree upon a verdict. (Section 1084, Code of Civil Procedure.) This statute is based upon constitutional authority. (Section 23, Article III, Constitution of Montana.) But if a verdict so rendered by the specified majority may be set aside by reason of affidavits made by dissenting jurors to the effect that, in the opinion of such dissenting jurors, the conclusion of the majority was reached by giving a wrong construction to or attaching undue weight to the evidence, or some part of it, then this statute is of little avail, for, if a difference of opinion as to the weight or construction of evidence did not exist, there could

never be a divided jury. It has long been the settled rule that, in the absence of a statute, and in order to secure freedom of thought, thorough discussion and independence of action, as well as to prevent undue influence and fraud, the construction or weight given to evidence submitted is not a subject of inquiry upon a motion for a new trial. Subdivision 2 of Section 1171 of the Code of Civil Procedure does not change this rule. (*Fredericks v. Judah*, 73 Cal. 604, 15 Pac. 305; *Saltzman v. Telephone Co.*, 125 Cal. 501, 58 Pac. 169; *Griffiths v. Montandon*, 4 Idaho, 377, 39 Pac. 549.)

5. There is a very substantial conflict in the evidence, and the contention of the appellant as to insufficiency of the evidence to sustain the findings is without merit. (*Babcock v. Maxwell*, 29 Mont. 31, 74 Pac. 64.)

The contention that the court submitted to the jury findings respecting issues not raised by the pleadings is made by objecting to instructions which are not before the court. The real question in controversy was the testamentary capacity of decedent at the date of the instrument purporting to be his last will, and, when the jury found that he was mentally incompetent to make a will, the other findings are immaterial, so far as the ultimate rights of the parties in this proceeding are concerned.

6. It is alleged that the court erred in admitting certain testimony. The witness testified, over objection, as to the condition of the decedent before and after the date of the document alleged to be his will, detailing circumstances relative to his mental and physical condition for six months prior to the date of the instrument. The witness further gave it as his conclusion that the decedent was not mentally competent to make a will. It is a well-settled rule that "one not an expert may give an opinion, founded upon observation, that a certain person is sane or insane." The witness in this case detailed the circumstances upon which he based his conclusion, and all his statements went to the jury. There was no error in admitting this testimony. (Lawson, *Opinion Evidence*, 2d Ed., p. 532.) The witness Fanny Spencer, mother and guardian of the plaintiff, testified

on cross-examination that, some years prior to the institution of these proceedings, similar proceedings had been instituted by her as guardian, and that the same had been dropped. The witness was then asked by appellant to state by whom the proceedings had been dropped. Objection was sustained to the question on the ground that the court records were the best evidence. No attempt appears to have been made in this case to introduce any evidence or raise any question as to another action pending or as to any former adjudication, and, if such attempt had been made, it is quite apparent that the court records in such other proceeding or former adjudication would be the best evidence. It is apparent the appellant was not injured by this ruling of the court.

We recommend that the cause be remanded, with directions that the judgment be modified in accordance with the views herein expressed, and that, upon the entry of the judgment as modified, the judgment and order appealed from be affirmed.

PER CURIAM.—For the reasons stated in the foregoing opinion, the cause is remanded to the district court, with directions to modify the judgment entered, by holding the probate of the will set aside only in so far as the interests of the contestant James R. Spencer are concerned; that the interest of said contestant under the law of succession be adjudged; and, as so modified, the judgment and order are affirmed. It is further ordered that each of the parties to this appeal pay his own costs.

*Modified and affirmed.*

MR. CHIEF JUSTICE BRANTLY, being disqualified, takes no part in this decision.

# MEMORANDA

OF

DECISIONS RENDERED WITHOUT WRITTEN OPINIONS DURING THE PERIOD EMBRACED IN THIS VOLUME.

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No. 2,083.—STATE EX REL. JAMES DONOVAN, RELATOR, *v.* DISTRICT COURT OF THE FIRST JUDICIAL DISTRICT OF MONTANA IN AND FOR LEWIS AND CLARKE COUNTY, RESPONDENT.

Original—*Certiorari* and *mandamus*.

Decided June 24, 1904.

PER CURIAM.—The relator's application for a writ of review and mandate is hereby denied and proceeding dismissed.

*Mr. James Donovan, Attorney General, pro se.*

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No. 2,087.—STATE OF MONTANA EX REL. D. P. WORTMAN, RELATOR, *v.* THE SECOND JUDICIAL DISTRICT COURT IN AND FOR SILVER BOW COUNTY ET AL., RESPONDENTS.

Original—Supervisory control.

Decided July 11, 1904.



PER CURIAM.—Relator's application for a writ of supervisory control or some other appropriate writ herein, is hereby denied.

*Messrs. Kirk & Clinton*, for Relator.

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No. 2,107.—THE STATE OF MONTANA EX REL. THEODORE HENNESSY, RELATOR, v. DISTRICT COURT OF THE SECOND JUDICIAL DISTRICT OF MONTANA IN AND FOR SILVER BOW COUNTY ET AL., RESPONDENTS.

Original—Supervisory control.

Decided September 24, 1904.

PER CURIAM.—Relator's application for a writ of supervisory control herein is hereby denied.

*Mr. B. S. Thresher*, for Relator.

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No. 2,065.—CHAS. A. LYNCH, RESPONDENT, v. FRED. HERRIG, APPELLANT.

*Appeal from District Court, Flathead County; D. F. Smith, Judge.*

On motion to dismiss appeal from order denying new trial.

Decided September 28, 1904.

PER CURIAM.—Upon motion of respondent herein the appeal from the order denying the motion for a new trial is hereby dismissed.

*Mr. S. M. Logan*, for Appellant.

*Messrs. Noffsinger & Folsom*, for Respondent.

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No. 1,943.—WM. W. DEWITT, APPELLANT, v. MARGARET MORASE, RESPONDENT.

*Appeal from District Court, Fergus County; E. K. Cheadle, Judge.*

On motion to dismiss appeal.

Decided September 28, 1904.

PER CURIAM.—Upon motion of the respondent herein the appeal is hereby dismissed.

*Messrs. Cort & Worden*, for Appellant.

*Mr. R. Von Tobel*, for Respondent.

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No. 2,075.—ANNIE M. HYNES, RESPONDENT, v. FRANK E. BARNES, CONSTABLE, APPELLANT.

*Appeal from District Court, Granite County; Welling Napton, Judge.*

On motion to dismiss appeal.

Decided September 30, 1904.

PER CURIAM.—Upon motion of the respondent herein this appeal is hereby dismissed.

*Mr. D. M. Durfee, and Mr. J. Shull, for Appellant.*

*Mr. Geo. A. Maywood, for Respondent.*

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No. 1,986.—H. L. MAURY, RESPONDENT, *v.* J. H. FARISS, APPELLANT.

*Appeal from District Court, Silver Bow County; William Clancy, Judge.*

On motion to dismiss appeal.

Decided October 15, 1904.

PER CURIAM.—This appeal is hereby dismissed as per stipulation of counsel for respective parties.

*Mr. Thomas J. Walker, Mr. Geo. F. Shelton, and Mr. J. J. McHatton, for Appellant.*

*Mr. J. E. Healy, for Respondent.*

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No. 2,116.—THE STATE OF MONTANA *EX REL.* JOHN R. BORDEAUX, RELATOR, *v.* DISTRICT COURT OF THE SECOND JUDICIAL DISTRICT OF MONTANA IN AND FOR SILVER BOW COUNTY *ET AL.*, RESPONDENTS.

Original—Injunction.

Decided October 22, 1904.

PER CURIAM.—Relator's application for a writ of injunction herein is hereby denied.

*Mr. B. S. Thresher, Mr. C. F. Kelley, and Mr. Peter Breen,*  
for Relator.

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No. 1,980.—ALEX. MACKEL, TRUSTEE, APPELLANT, v.  
HENRY R. BARTLETT, RESPONDENT.

*Appeal from District Court, Silver Bow County; William  
Clancy, Judge.*

On motion to dismiss appeal.

Decided November 23, 1904.

PER CURIAM.—Upon motion of the respondent herein this appeal is hereby dismissed.

*Mr. Peter Breen, and Mr. John A. Shelton,* for Appellant.

*Mr. John J. McHatton,* for Respondent.

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No. 2,122.—HENNESSY MERCANTIE CO., RESPONDENT,  
v. J. KALOUSEK ET AL., APPELLANTS.

*Appeal from District Court, Silver Bow County.*

On motion to dismiss appeal.

Decided December 1, 1904.

PER CURIAM.—Upon motion of respondent herein this appeal is dismissed.

*Mr. C. M. Parr*, for Appellant.

*Mr. M. J. Cavanaugh*, for Respondent.

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No. 2,100.—THOMAS C. RICHARDS, RESPONDENT, *v.* GEORGE JONES, APPELLANT.

*Appeal from District Court, Choteau County; John W. Tattan, Judge.*

On motion to dismiss appeal.

Decided December 6, 1904.

PER CURIAM.—Upon motion of the appellant herein this appeal is dismissed.

*Messrs. Walsh & Newman*, for Appellant.

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No. 2,067.—EDWARD H. LOVE, APPELLANT, *v.* ANNIE FLAHERTY ET AL., RESPONDENTS.

*Appeal from District Court, Missoula County; F. C. Webster, Judge.*

On motion to dismiss appeal.

Decided December 6, 1904.

PER CURIAM.—Upon motion of the appellant the appeal herein is dismissed without prejudice.

*Messrs. Toole & Bach*, for Appellant.

*Messrs. Woody & Woody*, and *Mr. E. E. Hershey*, for Respondents.

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NO. 2,096.—E. A. NICHOLS ET AL., APPELLANTS, *v.* JAMES MAHER, TREASURER, RESPONDENT.

*Appeal from District Court, Silver Bow County; E. W. Harney, Judge.*

On motion to dismiss appeal.

Decided December 19, 1904.

PER CURIAM.—Upon motion of the appellants the appeal herein is hereby dismissed.

*Mr. E. M. Lamb, Mr. C. F. Kelley, Mr. E. S. Booth*, and *Messrs. Kirk & Clinton*, for Appellants.

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NO. 2,129.—STATE OF MONTANA EX REL. JAS. DONOVAN, ATTORNEY GENERAL, RELATOR, *v.* INTERNATIONAL HARVESTER CO. OF AMERICA, RESPONDENT.

*Mr. James Donovan, Attorney General, pro se.*

*Mr. T. J. Walsh, Mr. E. B. Burling*, and *Mr. J. C. McMath*, for Respondent.

NO. 2,132.—STATE OF MONTANA EX REL. JAS. DONOVAN, ATTORNEY GENERAL, RELATOR, *v.* CUDAHY PACKING CO., A CORPORATION, RESPONDENT.

*Mr. James Donovan, Attorney General, pro se.*

*Mr. M. S. Gunn, for Respondent.*

No. 2,133.—STATE OF MONTANA EX REL. JAS. DONOVAN, ATTORNEY GENERAL, RELATOR, *v.* ARMOUR PACKING CO., A CORPORATION, RESPONDENT.

*Mr. James Donovan, Attorney General, pro se.*

*Mr. M. S. Gunn, for Respondent.*

No. 2,134.—STATE OF MONTANA EX REL. JAS. DONOVAN, ATTORNEY GENERAL, RELATOR, *v.* HAMMOND PACKING CO. OF CHICAGO, A CORPORATION, RESPONDENT.

*Mr. James Donovan, Attorney General, pro se.*

*Mr. M. S. Gunn, for Respondent.*

No. 2,135.—STATE OF MONTANA EX REL. JAS. DONOVAN, ATTORNEY GENERAL, RELATOR, *v.* HAMMOND PACKING CO. OF PUEBLO, COLO., A CORPORATION, RESPONDENT.

*Mr. James Donovan, Attorney General, pro se.*

*Mr. M. S. Gunn, for Respondent.*

No. 2,136.—STATE OF MONTANA EX REL. JAS. DONOVAN, ATTORNEY GENERAL, RELATOR, *v.* SWIFT & CO. OF CHICAGO, A CORPORATION, RESPONDENT.

*Mr. James Donovan, Attorney General, pro se.*

*Mr. M. S. Gunn, for Respondent.*

Original—Applications for injunction.

Decided December 24, 1904.

PER CURIAM.—These causes having been heretofore argued and submitted upon demurrers, it is hereby ordered and adjudged that the demurrers herein be and they are hereby sustained and the proceedings dismissed.

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No. 2,146.—CLINTON C. CLARK, APPELLANT, v. ROBERT WALL ET AL., RESPONDENTS.

Original—Injunction pending appeal.

Decided January 3, 1905.

PER CURIAM.—Appellant's motion for an injunction pending appeal herein is hereby granted, and an injunction ordered issued upon the filing and approval of a good and sufficient undertaking in the sum of \$5,000, conditioned according to law, said undertaking to be approved by the clerk of this court.

*Mr. J. L. Wines*, for Appellant.

*Mr. Jas. E. Murray*, and *Messrs. McBride & McBride*, for Respondents.

(Upon motion of respondents, injunction granted above was dissolved on January 23, 1905.)

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No. 2,063.—MILES FINLEN, APPELLANT, v. F. AUGUSTUS HEINZE ET AL., RESPONDENTS.

Original—Injunction pending appeal.

Decided January 18, 1905.

PER CURIAM.—Appellant's application for an injunction pending appeal is hereby denied.

*Mr. A. J. Shores*, for Appellant.



# INDEX.

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## ABSTRACTS OF TITLE.

### Omissions—Damages—Privity of Contract.

1. Where, though defendant abstract company had arrangements with plaintiff loan association by which abstracts were furnished at the cost of borrowers from the association, to be used by plaintiff, defendant agreed to furnish the abstract in question for plaintiff, and delivered the same, knowing that it was made for plaintiff's exclusive benefit and use, and that plaintiff would rely thereon, there was sufficient privity of contract to enable plaintiff to recover damages sustained by reason of a failure of the abstract to disclose an unsatisfied judgment against the land referred to therein.—*Western Loan & Savings Co. v. Silver Bow Abstract Co.*, 448.

### Omissions—Liability—Foreign Corporations—Licenses—Renewal.

2. Where plaintiff, a foreign corporation, was licensed to do business in Montana at the time it contracted with defendant abstract company for the preparation of an abstract, and it was not contended that plaintiff had not complied with the law at the time the mortgage taken on the faith of such abstract was foreclosed, and at the time action was brought to recover damages sustained from an omission in such abstract, it was immaterial that a short period existed in the meantime, during which plaintiff's license to do business had expired, and remained unrenewed.—*Western Loan & Savings Co. v. Silver Bow Abstract Co.*, 448.

## ACCEPTANCE.

See CONTRACTS, 11-14.

## ACCOUNTING.

See MINES, 9.

## ACCOUNT STATED.

### Pleadings—Copy of Account.

1. Code of Civil Procedure, Section 743, providing that it is not necessary for a party to set forth in his pleading the items of the account therein alleged, but must deliver to the adverse party, after demand, a copy of the account, applies to actions on open, unsettled accounts, and not to actions on accounts stated.—*Martin v. Heinze*, 68.

### Fraud—Error or Mistake—Pleadings.

2. An "account stated" is an agreement between the parties, either express or implied, that all the items are correct; this agreement is the cause of action, hence, in an action on an account stated, the items of the original account may not be inquired into or surcharged, except upon the ground of fraud, error or mistake in the ascertainment of the balance, and then only when the fraud, error or mistake upon which the agreement is sought to be impeached is specifically alleged in the answer.—*Martin v. Heinze*, 68.

sidered upon an appeal from the judgment.—*Beaudin v. Oregon Short Line R. R. Co.*, 238.

#### From Judgment—Record—Findings.

13. On appeal from the judgment only, the record may be examined to determine whether there is any evidence to support the finding.—*Sheldon v. Powell*, 249.

#### Certiorari—Justice Courts—Scope of Review.

14. An appeal from a judgment of the district court on a writ of review to a justice of the peace brings up for review only such questions as appear on the judgment roll, and other papers are not before the court.—*State ex rel. Grissom v. Justice Court et al.*, 258.

#### Certiorari—Justice Courts—Notice—Jurisdiction.

15. So far as *certiorari* proceedings are concerned there is no distinction between the justice of the peace court of a township presided over by S., justice of the peace, and S., justice of the peace of the township, so that notice of appeal in the name of the justice is sufficient to give jurisdiction; the authority of the "justice of the peace" and the "justice of the peace court" being identical.—*State ex rel. Grissom v. Justice Court et al.*, 258.

#### Certiorari.

16. Where appeal lies, *certiorari* will not lie.—*State ex rel. Grissom v. Justice Court et al.*, 258.

#### Action to Quiet Title—"Adverse Party"—Notice.

17. In an action by plaintiffs against their lessee and defendant to quiet title to mining property, *held*, that, under the particular circumstances, the lessee was not an "adverse party" (within the meaning of Code of Civil Procedure, Section 1724) on whom defendants were required to serve notice of appeal.—*Merk et al. v. Bowery Mining Co.*, 298.

#### Evidence—Insufficiency.

18. The alleged insufficiency of the evidence cannot be considered on appeal where the record does not show that it contains all, or the substance of all, the evidence.—*Merk et al. v. Bowery Mining Co.*, 298.

#### Motion to Dismiss—Specification of Errors.

19. Where an appeal was taken from a judgment and from an order denying a new trial, a motion to dismiss the appeal on the ground that the record or statement on the motion for a new trial did not contain a specification of errors was properly denied, since such objection was not ground for dismissal of the appeal from the judgment.—*Bond v. Hurd*, 314.

#### From Justice Court—Pleadings.

20. The pleadings in the district court on an appeal from a justice or police court are governed by the same rules as pertain to pleadings in such courts.—*Duane v. Mollnak*, 343.

#### From Justice Court—Jurisdiction of District Court.

21. The district court, sitting to hear appeals from the court of a justice of the peace or police court, must try the case *de novo*, and exercise only the same jurisdiction as was exercised by the court appealed from.—*Duane v. Mollnak*, 343.

**Pleadings—Amendment—Statute of Frauds.**

22. Where, in an action to recover a balance on a contract for the purchase of land, defendant answered, denying the allegations of the complaint, and alleging damages on account of certain misrepresentations as a counterclaim, such answer was not superseded by an amendment subsequently filed by defendant, after an appeal had been taken from the police court to the district court, pleading the statute of frauds as an affirmative defense.—*Duane v. Molinak*, 343.

**Probate Proceedings—Appealable Orders**

23. Under Code of Civil Procedure, Section 1722, Subdivision 3, as amended by Laws of 1899, page 146, which enumerates the specific instances in which an appeal may be taken to the supreme court from a district court in probate proceedings, orders refusing to vacate a decree of distribution and settlement of final account, and refusing to vacate an order settling an administrator's account and discharging him, which are not among the judgments or orders enumerated in the statute, are not appealable.—*In re Kelly's Estate*, 356.

**Instructions—Disregard by Jury—Effect.**

24. Where the evidence in the record clearly shows that the jury disregarded the instructions of the trial court, the verdict will be set aside, without determining the propriety of the instructions.—*McAllister v. Rocky Fork Coal Co.*, 359.

**Homicide—County Attorney's Argument—Objection.**

25. On a criminal prosecution, the county attorney made certain statements as to what, in his opinion, the evidence showed. Objection was made to such line of argument, and the court said that the county attorney had a right to state his theory of the case, and what the evidence showed, or tended to show, as a matter of argument, but that the jury should understand that what he had said was in argument, and not as a statement of fact. Held, that such remarks of the court were not erroneous.—*State v. Tully*, 365.

**Remarks of Court—Not Excepted to—Effect.**

26. Where no exception was taken to remarks of the court in ruling on an objection to an argument of counsel, the matter could not be considered on appeal.—*State v. Tully*, 365.

**From Judgment—Dismissal—When.**

27. Appeal from a judgment will be dismissed, the record not containing a copy of the judgment, as required by Code of Civil Procedure, Section 1736, or showing that judgment has been entered, as required by Section 1722, as amended by Session Laws 1899, p. 146.—*Johns v. Barnes*, 426.

**Undertaking—Failure to File—Effect.**

28. By express provision of Code of Civil Procedure, Section 1724, omission to file an undertaking in support of an appeal, as there provided, renders the appeal ineffectual for any purpose.—*Johns v. Barnes*, 426.

**Order—Not Appealable.**

29. An order overruling a motion to reject findings made by the jury is not appealable, not being among the orders enumerated in Code of Civil Procedure, Section 1722, as amended by Session Laws 1899, p. 146, from which appeals are allowed.—*Johns v. Barnes*, 426.

### Quieting Title—Findings—Allegation of Ownership.

30. Under Code of Civil Procedure, Section 1310, providing that an action may be brought by any person against another who claims an estate or interest in real property adverse to him, to determine such adverse claim, a complaint averring that plaintiff "claims to be the owner" of the property in question, and "claims title in fee," and that defendant "claims an estate or interest" therein adverse to plaintiff, which claim of defendant is without right, was not objectionable for the first time on appeal, on the ground that it nowhere pleads that plaintiff is the owner of the property, and pleads no better title for plaintiff than that set forth for defendant.—*Pollock Mining & Milling Co. v. Davenport*, 452; *Glengarry Mining & Milling Co. v. Davenport*, 454.

### Bill of Exceptions.

31. A bill of exceptions not made a part of the statement on motion for a new trial cannot be considered on appeal from the order denying it.—*In re Colbert's Estate*, 461.

### Divorce—Alimony—District Courts—Jurisdiction.

32. An action for divorce is still in the district court, notwithstanding pendency of an appeal, so as to authorize that court, by contempt proceedings, to compel obedience to its order for payment of alimony.—*State ex rel. Bordeaux v. District Court et al.*, 511.

### Complaint—Objection.

33. *Obiter*. An objection to a complaint, not made in the district court, will not be considered on appeal.—*McConnell et al. v. Combination M. & M. Co.* (on rehearing), 563.

### Guardian's Account—Settlement.

34. An order confirming a guardian's account, being appealable under Session Laws of 1899, page 146, and no appeal having been taken therefrom, questions respecting its settlement cannot be considered on a subsequent appeal from an order of sale of the ward's real estate.—*In re Scheuer's Estate*, 606.

### Transcript—Presumptions.

35. Where the transcript upon an appeal from a judgment does not contain any testimony, bill of exceptions, or statement on motion for a new trial, it must be presumed that the evidence supported the judgment, and that the instructions were based on the testimony.—*Pryor v. City of Walkerville*, 618.

### Judgments—Erroneous Instructions—Transcript—Evidence.

36. A judgment attacked upon the ground that the instructions were erroneous, will not be disturbed, where the transcript does not contain any of the evidence, unless the instructions would have been erroneous under every conceivable state of facts.—*Pryor v. City of Walkerville*, 618.

### Instructions—Personal Injuries—Harmless Error.

37. The giving of instructions, in an action for damages for personal injuries resulting from a defective sidewalk, which misnamed the street where the accident was alleged to have occurred, will not justify the reversal of a judgment in favor of plaintiff, where it appears that the rights of appellant were not prejudiced by such obvious mistake or clerical error.—*Pryor v. City of Walkerville*, 618.

Complaint—Verification—Objections—When to be Made.

38. An objection to the verification of a complaint cannot be made for the first time in the appellate court.—*Pryor v. City of Walkerville*, 618.

Instructions—Judgment Roll.

39. Unless instructions given, and those requested and refused, are made part of the judgment roll, they will not be considered on appeal.—*Spencer v. Spencer*, 631.

Findings—Issues—Harmless Error.

40. The submission of issues not raised by the pleadings is harmless, when the findings thereon, in view of the authorized findings, are immaterial, so far as the ultimate rights of the parties are concerned.—*Spencer v. Spencer*, 631.

Verdict—Findings—Evidence—Conflict.

41. Where there is a substantial conflict in the evidence, a verdict or finding will not be disturbed on appeal.—*Spencer v. Spencer*, 631.

APPURTENANCES.

Water Rights—Use On Rented Land—Effect.

1. Where a person owning a water right, rents land and uses a portion of the water on the land, such use of the water will not, of itself, furnish any ground for the inference that he intended to make his water right or any portion of it appurtenant to the land.—*Hays v. Buzard et al.*, 74.

Water Rights—Proof.

2. A person asserting that a water right and a ditch are appurtenant to certain land must prove that they are appurtenances and must connect himself with the title of the prior appropriator.—*Hays v. Buzard et al.*, 74.

Deed—Water Rights.

3. A deed of land, together with all appurtenances, water rights and water ditches to the same belonging, and all the estate, title, interest, claim or demand of the grantor therein, conveys only such water rights as are appurtenant to the land.—*Hays v. Buzard et al.*, 74.

Water Rights—Evidence.

4. Evidence examined and held, to justify the trial court in finding that a certain water right was not appurtenant to a particular piece of land.—*Hays v. Buzard et al.*, 74.

Water Rights—Conveyance—Evidence.

5. Where plaintiff in a suit to determine water rights asserted rights under a deed conveying all the appurtenances, water rights and water ditches, and all the interest of the grantor, evidence showing the exclusive use of the water by defendants for ten years, during which time neither plaintiff nor his immediate predecessor asserted any right thereto, justified the conclusion that plaintiff's claim was not well founded.—*Hays v. Buzard et al.*, 74.

ARGUMENT.

See COUNTY ATTORNEYS, 1.

See EXCEPTIONS, 1.

## ARREST OF JUDGMENT.

See JUDGMENTS, 6, 7.

## ASSESSMENTS.

See CORPORATIONS.

## ATTORNEYS.

## Administrators—Fees—When Not Recoverable.

1. An administrator cannot charge the estate with expenses incurred in advising with counsel with respect to interests and demands antagonistic to the claims of the heirs when he knows that such counsel is representing the antagonistic interests.—*In re Davis' Estate*, 421.

## Fees—Administrator's Account—Sufficiency.

2. Where attorneys were retained generally, and represented the estate in all litigation for several years, the administrator's account for the amount paid such attorneys is sufficiently itemized by giving the dates of the commencement and close of such services, with the gross amount.—*In re Davis' Estate*, 421.

## Fees—Administrator's Account—Evidence—Sufficiency.

3. Evidence in support of an administrator's account held sufficient to sustain the allowance to an attorney for the estate of \$12,500 for two and one-half years' services.—*In re Davis' Estate*, 421.

## Corporations—Money Paid to Directors as Attorney's Fees—To Whom Chargeable.

4. In an action against the officers and directors of a corporation for fraudulent misappropriation of corporate funds, the fact that sums of money were paid to the president and vice-president and charged up to the corporation as attorney's fees, neither the president nor vice-president being an attorney and no employment as such by the company having been shown, is not conclusive, and the items should be charged against defendants or not, upon proof of the real purpose for which they were expended.—*McCConnell et al. v. Combination M. & M. Co.* (on rehearing), 563.

## BANKRUPTCY.

## Chattel Mortgage—Validity.

1. Under Civil Code, Section 4491, a mortgage of personalty and transfer thereunder are void against a trustee in bankruptcy where the mortgage was made more than fourteen months prior to the transfer.—*Stewart v. Hoffman* (see rehearing), 184.

## Chattel Mortgages—Validity—Statutes.

2. In an action by a trustee in bankruptcy to recover property of the bankrupt alleged to have been fraudulently transferred to defendant, where it appeared that the transfer was made within four months of the time the debtor was adjudged to be a bankrupt, and under a chattel mortgage having no validity under the laws of the state where the transfer was made, the trustee was entitled to judgment under Bankruptcy Act July 1, 1898, c. 541, Section 60, cl. "a," 30 Stat. 562; it appearing that the transfer

was not to secure a present loan or advance, but one to pledge the payment of an old obligation, the effect of which was to enable the defendant to obtain a greater proportion of his debt than any other creditor of the bankrupt.—*Stewart v. Hoffman* (see rehearing), 184.

#### Chattel Mortgages—Fraudulent Transfer—Statutes.

3. In an action by a trustee in bankruptcy to recover property of the bankrupt alleged to have been fraudulently transferred to the defendant, under a chattel mortgage executed more than fourteen months prior to such transfer and good between the parties to the instrument, where it appeared that the transfer was made within four months of the time when the debtor was adjudged a bankrupt, the trustee was not entitled to judgment under the provisions of the Bankruptcy Act of July 1, 1898 (Chapter 541, Sec. 60, cl. a. 30 Stat. 562), the delivery to, and taking by, defendant of the goods not having been unlawful under the laws of this state nor an unlawful preference under the Bankruptcy Act.—*Stewart v. Hoffman* (on rehearing), 190.

#### United States Supreme Court—Holdings Conclusive.

4. In all matters pertaining to a construction of the United States Bankruptcy Act, the holdings of the Supreme Court of the United States are conclusive.—*Stewart v. Hoffman* (on rehearing), 190.

### BILL OF EXCEPTIONS.

See, also, APPEAL, 6.

#### Evidence—Sufficiency—Appeal.

1. Under a statute providing that in the settlement of statements and bills of exceptions the court shall eliminate all immaterial evidence, if a bill of exceptions or statement appears to contain all material evidence, or the substance thereof, given on the trial of the case, referring to the points brought before the supreme court for review, that court has full power to consider the sufficiency of the evidence, if properly specified as a ground of error.—*Handley v. Sprinkle*, 57.

#### New Trial—Specification of Errors

2. Where a motion for a new trial was made on a bill of exceptions, and not on a statement of facts, it was not objectionable for failure of such bill to contain a specification of errors.—*Bond v. Hurd*, 314.

#### Appeal—New Trial—Statement.

3. A bill of exceptions not made a part of the statement on motion for a new trial cannot be considered on appeal from the order denying it.—*In re Colbert's Estate*, 461.

### BILLS OF LADING.

#### Sale—Delivery—Action for Price.

1. Defendant ordered of plaintiff lime which he wished to use on a certain date. Plaintiff did not place the lime on the car until six days thereafter, and after loading it, he received a letter from defendant countermanding the order. He could have recalled the shipment any time within twenty-four hours after receiving such letter, but did not. Plaintiff did not send defendant the bill of lading, having kept it, as he testified, until he could

"see what was going to happen." *Held*, that the lime was not delivered, and defendant was not under any obligation to accept it on its arrival.—*McKelvey v. Perham*, 802.

#### BILLS OF PARTICULARS.

##### Account Stated—Remedy.

1. *Seemle*. If, in an action upon an account stated, it should become necessary that the defendant have a bill of particulars, or otherwise ascertain the facts, in order that he may prepare his defense, the appropriate remedy would seem to be an application to the court for such a bill, or for an inspection of plaintiff's accounts, under Section 1810 of the Code of Civil Procedure.—*Martin v. Heinze*, 68.

#### BONDS.

See, also, SURETIES, 1.

##### Indemnifying—Delivery of Possession.

1. Under Code of Civil Procedure, Section 1220, providing that, if personal property levied upon under execution be claimed by a third person, the same proceedings shall be had as provided in relation to attachment, in Section 906 of said Code, which provides for notice of claim to the officer, and a delivery of the property to the claimant, unless plaintiff gives an indemnifying bond, the officer is not bound to deliver possession to the claimant if the execution plaintiff furnishes an indemnifying bond.—*Gallick v. Bordeaux et al.*, 328.

#### BRIEFS.

##### Specifications of Error—Reasons.

1. It is not necessary for the appellant to assign his reasons in the specifications of error contained in his brief.—*State ex rel. Grissom v. Justice Court et al.*, 258.

#### BURDEN OF PROOF.

##### Mortgages—Release—Setting Aside.

1. Under Civil Code, Section 2170, one attacking the release of a mortgage, which was given to him and released by himself, in the manner prescribed in Civil Code, Section 3845, assumed the burden of showing the existence of facts sufficient to warrant a court of equity in setting it aside.—*Mueller v. Renkes*, 100.

##### Mortgages—False Certificate - Notaries—Action.

2. In an action against a notary for falsely certifying to an acknowledgment of a mortgage, on the security represented by which plaintiff advanced a loan, the burden was on plaintiff to show the value of the security which he would have received had the mortgage been valid.—*Mahoney v. Dixon et al.*, 107.

##### Negligence—Proximate Cause.

3. In an ordinary case of negligence, the burden of proof is upon plaintiff to show by competent evidence the negligence of defendant as alleged, and also that such negligence was the proximate cause of plaintiff's injury.—*Shaw v. New Year Gold Mines Co.*, 138.



**Deed Not of Record—Grantee—Notice.**

4. The burden is on the grantee in an unrecorded deed to show that a subsequent purchaser had notice.—*Sheldon v. Powell*, 249.

**Sales—Contracts—Breach—Statutes.**

5. Where the value of property involved in a sale is sufficient to bring the contract of sale within the provisions of Civil Code, Sections 2185, 2340, and Code of Civil Procedure, Section 3276, the burden is on plaintiff, in an action for breach of the contract, to establish by a preponderance of evidence that a valid contract under the statutes was entered into between the parties, together with a breach of such contract, and the consequent damages.—*Brophy v. Idaho Produce & Provision Co.*, 279.

**Practice—Nonsuit—Effect—Submission of Case on Plaintiff's Evidence.**

6. Defendant, if satisfied that the evidence introduced by plaintiff is not sufficient to warrant a recovery, may move for nonsuit, which raises a question of law, admitting the truth of the evidence but questioning its sufficiency, or, proceeding upon the theory that the jury will not believe plaintiff's testimony, may have the case submitted to the jury upon plaintiff's evidence alone, in which case the question submitted is one of fact, with the burden of proof on plaintiff to establish by a preponderance of the evidence the allegations of his complaint.—*Brophy v. Idaho Produce & Provision Co.*, 279.

**Evidence—Telegrams—Original—Copy.**

7. Where plaintiff relied on a telegram the burden was on him to prove the loss of the original, to authorize the admission of a copy.—*Bond v. Hurd*, 314.

**Claim and Delivery—Ownership—Constables.**

8. In an action in claim and delivery for property wrongfully seized by a constable under execution, where plaintiff alleged that he was the owner of the goods when seized, which the answer denied, the burden was upon plaintiff to prove the ownership or right of possession, and in relying upon a sale from the execution defendant it was incumbent upon him to show a valid sale.—*Gallick v. Bordeaux et al.*, 328.

**Claim and Delivery—Constables—Wrongful Seizure—Bona Fide Sale.**

9. In an action in claim and delivery for property wrongfully seized by a constable under an execution, where plaintiff claimed title by virtue of a sale from the execution defendant, the burden of proof which was upon him to establish a *bona fide* sale was not shifted by mere proof of notice of claim to the constable at the time of the levy.—*Gallick v. Bordeaux et al.*, 328.

**Lost Wills—Presumptions.**

10. It being proved that a lost will was last seen in the possession of the testator, who was in the exercise of his mental faculties, the presumption is that he himself destroyed it *animo revocandi*, and the burden of proof is then on the proponent to overcome such presumption.—*In re Colbert's Estate*, 461.

**Corporations—Directors—Bona Fide Transactions.**

11. The burden is on directors of a corporation to show that transactions had by them with the corporation, from which they make a profit, are fair and *bona fide*.—*Coombs et al. v. Barker et al.*, 526.

## Partition—Prior Agreement for.

12. In a suit for partition, the party who alleges prior partition or relies upon an oral agreement respecting it, has the burden of showing the existence of such agreement.—*Hurley v. O'Neill*, 595.

## BURGLARY.

See CRIMINAL LAW, 1-4.

## CERTIORARI.

## Appeal—Scope of Review.

1. An appeal from a judgment of the district court on a writ of review to a justice of the peace brings up for review only such questions as appear on the judgment roll, and other papers are not before the court.—*State ex rel. Grissom v. Justice Court et al.*, 258.

## Justice Courts—Notice of Appeal—Jurisdiction.

2. So far as *certiorari* proceedings are concerned there is no distinction between the justice of the peace court of a township presided over by S., justice of the peace, and S., justice of the peace of the township, so that notice of appeal in the name of the justice is sufficient to give jurisdiction; the authority of the "justice of the peace" and the "justice of the peace court" being identical.—*State ex rel. Grissom v. Justice Court et al.*, 258.

## When Writ Will Lie.

3. Under Code of Civil Procedure, Section 1941, to entitle one to a writ of review from the district court it must appear that the inferior tribunal was performing some judicial act, that such tribunal exceeded its jurisdiction, and that there is no appeal or other speedy and adequate remedy.—*State ex rel. Grissom v. Justice Court et al.*, 258.

## Appeal.

4. Where appeal lies, *certiorari* will not lie.—*State ex rel. Grissom v. Justice Court et al.*, 258.

## CHANGE OF VENUE

See, also, VENUE.

## Matter of Right.

1. Where at the time suit was brought in B. county, where plaintiff resided, on a cause of action included within Section 613, Code of Civil Procedure, defendant was a *bona fide* resident of V. county, in which he was served, defendant was entitled to a change of venue to V. county as a matter of right.—*Bond v. Hurd*, 314.

## Complaint—Abridging Right.

2. Where two of three causes of action alleged in a complaint were such that defendant was clearly entitled to a change of venue to the county in which he resided, plaintiff was not entitled to abridge such right by joining in the complaint a third cause of action which might be properly triable in the county where the suit was brought.—*Bond v. Hurd*, 314.

## CLAIM AND DELIVERY.

## Pleadings—Complaint.

1. Plaintiffs alleged that, being owners of certain capital stock in defendant company, they deposited it with the company, to be sold by defendant, and the proceeds used in paying its debts. In consideration of an agreement that plaintiffs should hold the offices of vice president, trustee and general manager and treasurer of the defendant until its business should be in successful operation; that defendant violated its agreement, and ejected plaintiffs from said offices, and had sold and issued the stock to others, and refused and failed to deliver it to the plaintiffs, or to pay plaintiffs the value thereof, though requested to do so. The prayer was for recovery of the possession of the stock, or its value in case delivery could not be had. *Held*, that the complaint did not state a cause of action in claim and delivery, as the statement that defendant had disposed of the stock showed that, at the commencement of the action, defendant did not wrongfully retain possession of the property from plaintiffs.—*Glass et al. v. Bastin & Bay State M. Co.*, 21.

## Constables—Ownership of Property—Burden of Proof.

2. In an action in claim and delivery for property wrongfully seized by a constable under execution, where plaintiff alleged that he was the owner of the goods when seized, which the answer denied, the burden was upon plaintiff to prove the ownership or right of possession, and in relying upon a sale from the execution defendant it was incumbent upon him to show a valid sale.—*Gallick v. Bordeaux et al.*, 328.

## Ownership—General Denial—Proof.

3. In an action in claim and delivery for property wrongfully seized under execution defendant could, under a general denial of plaintiff's ownership of the goods seized, show that a sale under which plaintiff claimed was void.—*Gallick v. Bordeaux et al.*, 328.

Constables—*Bona Fide* Sale—Burden of Proof.

4. In an action in claim and delivery for property wrongfully seized by a constable under an execution, where plaintiff claimed title by virtue of a sale from the execution defendant, the burden of proof which was upon him to establish a *bona fide* sale was not shifted by mere proof of notice of claim to the constable at the time of the levy.—*Gallick v. Bordeaux et al.*, 328.

## Instructions.

5. In an action in claim and delivery plaintiff must recover upon the strength of his own title, and not upon the weakness of defendant's title, and an instruction authorizing a verdict for plaintiff if there were some particular defects in the justification relied upon by defendant, is erroneous.—*Gallick v. Bordeaux et al.*, 328.

## Wrongful Seizure—Measure of Damages.

6. In an action in claim and delivery, brought by a mortgagee for the wrongful seizure of property under writ of execution, the measure of damages if return of the goods cannot be had is the value of the goods up to the amount of the indebtedness, with accrued interest, and not the value of the property and the amount of the indebtedness with interest.—*Gallick v. Bordeaux et al.*, 328.

## Wrongful Seizure—Instructions—Error.

7. In an action in claim and delivery for property wrongfully seized under execution, an instruction authorizing a verdict for defendant unless the sale under which plaintiff claimed was followed by "an actual and continued change of possession" was improperly modified by striking out the words "and continued."—*Gallick v. Bordeaux et al.*, 328.

## Constable—Sureties—When Not Proper Parties.

8. The action of claim and delivery lies only against the party in possession, and when brought against a constable for the wrongful seizure of property under a writ of execution the sureties on his official bond are improperly joined as parties defendant, where they were not in any manner concerned with the seizure or detention of the property.—*Gallick v. Bordeaux et al.*, 328.

## Complaint—Requisites.

9. In an action in claim and delivery, in order to state a cause of action, the complaint must not only allege ownership or right of possession in the plaintiff, but it must allege the wrongful seizure and detention of the property by the defendant.—*Gallick v. Bordeaux et al.*, 328.

## CLERICAL ERRORS.

See INSTRUCTIONS, 15.

## COMMISSIONS.

## Action—Evidence—Findings—Agreement to Pay Debt.

1. Evidence in an action for commissions for selling coal held sufficient to sustain a finding that plaintiff, in consideration of his agency for defendants, agreed to pay a debt owing them by another.—*McCormick v. Johnson et al.*, 266.

## Findings—Evidence—Indebtedness Equaling Commissions.

2. Evidence in an action for commissions held sufficient to sustain a finding that plaintiff's indebtedness to defendants equaled the amount of the commissions.—*McCormick v. Johnson et al.*, 266.

## Agreement to Pay Debt of Another—Evidence.

3. Defendants who, in an action against them for commissions earned by a firm, claim that for a valuable consideration the firm agreed to pay the debt of an insolvent corporation to them, may testify that they received nothing from the assignee of the corporation.—*McCormick v. Johnson et al.*, 266.

## CONFLICT.

See EVIDENCE, 50.

FINDINGS, 9.

VERDICT, 1.

## CONSIDERATION.

## Inadequacy—Conveyances.

1. Mere inadequacy of consideration is not of itself sufficient cause to invalidate a conveyance, except in extreme cases.—*Mueller v. Renkes*, 100.

Nominal—Fraud.

2. Where the owner of land conveyed the same to one to whom the owner was indebted for advances, the real consideration being \$2,100, and between \$800 and \$1,200 having been paid on the execution of the deed, the balance being covered by the advances, though the nominal consideration in the deed was only \$1, such conveyance was not fraudulent as to creditors.—*Mueller v. Renkes*, 100.

CONSTABLES.

Justice Courts—Summons—Non-Official Person—Statutes.

1. Code of Civil Procedure, Section 1688, as amended by Session Laws 1899, page 138, providing for the appointment of a special constable where no constable is elected or appointed to act in certain cases, did not affect Section 1510, authorizing a non-official person to serve a justice's summons.—*State ex rel. Reagan v. Harrington*, 294.

Wrongful Seizure of Property—Instructions.

2. In an action against a constable for the wrongful seizure of property under execution, the questions whether the justice had jurisdiction of the parties and of the subject-matter, whether the judgment was wrongfully made, and whether the execution was in due form, were questions of law, and instructions that those things must appear in order to make out the defense of justification under the writ were erroneous in submitting legal questions to the jury.—*Gallick v. Bordeaux et al.*, 328.

Claim and Delivery—Burden of Proof.

3. In an action in claim and delivery for property wrongfully seized by a constable under execution, where plaintiff alleged that he was the owner of the goods when seized, which the answer denied, the burden was upon plaintiff to prove the ownership or right of possession, and in relying upon a sale from the execution defendant it was incumbent upon him to show a valid sale.—*Gallick v. Bordeaux et al.*, 328.

Execution—Indemnifying Bond—Delivery of Possession.

4. Under Code of Civil Procedure, Section 1220, providing that, if personal property levied upon under execution be claimed by a third person, the same proceedings shall be had as provided in relation to attachment, in Section 906 of said Code, which provides for notice of claim to the officer, and a delivery of the property to the claimant, unless plaintiff gives an indemnifying bond, the officer is not bound to deliver possession to the claimant if the execution plaintiff furnishes an indemnifying bond.—*Gallick v. Bordeaux et al.*, 328.

Levy—Bona Fide Sale—Burden of Proof.

5. In an action in claim and delivery for property wrongfully seized by a constable under an execution, where plaintiff claimed title by virtue of a sale from the execution defendant, the burden of proof which was upon him to establish a *bona fide* sale was not shifted by mere proof of notice of claim to the constable at the time of the levy.—*Gallick v. Bordeaux et al.*, 328.

CONSTITUTION.

Elections—County Officers—Tie Vote—Appointment.

1. Political Code, Section 1171, providing that in case of a tie vote for a county officer, except county commissioner, the county commissioners shall

appoint some eligible person to fill the office, as in case of other vacancies in such office. In so far as it relates to officers named in Constitution, Article XVI, Section 5, providing that such officers shall hold their offices for two years, and until their successors are elected and qualified, is invalid, as in contravention of such section.—*State ex rel. Chenoweth v. Acton*, 37.

#### County Superintendent of Schools—Qualifications.

2. The office of county superintendent of schools being an office created by the Constitution, it was incompetent for the legislature to prescribe by Political Code, Section 1744, as an additional qualification to those prescribed by the Constitution, that an aspirant to such office should be the holder of a teacher's certificate of the highest county grade.—*State ex rel. Chenoweth v. Acton*, 37.

### CONSTITUTION OF MONTANA.

#### List of Section Cited or Commented Upon.

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### CONTEMPT.

#### Account Stated—Refusal to Furnish "Further Account."

1. Under Code of Civil Procedure, Section 743, if the "further account" is not furnished in obedience to the order, the penalty is not a refusal to hear evidence in support of the claim, but punishment as for a contempt.—*Martin v. Heinze*, 68.

#### Supplementary Proceedings.

2. Where in supplementary proceedings the court erroneously ordered that defendant satisfy plaintiff's judgment out of the proceeds of an order on a certain society payable to defendant, instead of appointing a receiver to collect the order and make the application, and defendant was committed for contempt for failing to comply with the order, the court having had jurisdiction of the supplementary proceedings and of the person of defendant, defendant could not obtain release from custody on *habeas corpus*, irrespective of any question as to the appealability of the order.—*In re Downey*, 441.

**Allmony—Modification of Order—Supervisory Control.**

3. One ordered to pay allmony, to protect himself from contempt proceedings for noncompliance therewith because of stress of circumstances, should apply for revocation or modification of the order, and, upon failure of such application to the district court, the writ of supervisory control will not lie to relieve him from punishment for noncompliance with such order.—*State ex rel. Bordeaux v. District Court et al.*, 511.

**Divorce—Allmony—Appeal—Jurisdiction.**

4. An action for divorce is still in the district court, notwithstanding pendency of an appeal, so as to authorize that court, by contempt proceedings, to compel obedience to its order for payment of allmony.—*State ex rel. Bordeaux v. District Court et al.*, 511.

CONTESTS.

See ELECTIONS.

See WILLS.

CONTRACTS.

**Illegal—Corporations—Election of Directors.**

1. Plaintiffs could not recover as on a contract, as the alleged contract was illegal, under Civil Code, Section 431, requiring directors of the corporation to be elected annually by the stockholders or members, and Section 2240, declaring that unlawful which is contrary to an express provision of the law.—*Glass et al. v. Basin & Bay State M. Co.*, 21.

**Illegal—Performance.**

2. Plaintiffs could not recover as on a disaffirmance of an illegal contract, as the complaint showed performance on their part, and reliance on the contract.—*Glass et al. v. Basin & Bay State M. Co.*, 21.

**Parol Evidence—Varying Written Contract—Fraud.**

3. Plaintiff alleged mistake and fraud, and the evidence disclosed that the inducement held out to plaintiff to sign an agreement was based on fraudulent representations of defendants that a lease need not be mentioned in a contract of sale of a business and the lease. Held, that evidence was admissible showing the purchase of the lease and defendants' fraudulent conduct, over objection that it varied the contract.—*Sathre v. Rolfe et al.*, 85.

**Leasehold—Evidence.**

4. Where a contract of sale of a business omitted reference to a leasehold interest by fraudulent representations of defendants as to the lease being a separate writing, evidence showing the purchase of the leasehold interest was admissible, as being independent and collateral to the portion which was reduced to writing.—*Sathre v. Rolfe et al.*, 85.

**Sale—Breach—Burden of Proof.**

5. Where the value of property involved in a sale is sufficient to bring the contract of sale within the provisions of Civil Code, Sections 2185, 2340, and Code of Civil Procedure, Section 3276, the burden is on plaintiff, in an action for breach of the contract, to establish by a preponderance of evidence that a valid contract under the statutes was entered into between the parties, together with a breach of such contract, and the consequent damages.—*Brophy v. Idaho Produce & Provision Co.*, 279.

## Rescission—Rules Governing.

6. Under Civil Code, Sections 2271, 2273, requiring that the party rescinding a contract must rescind promptly on discovering the facts, and must restore, or offer to restore, everything of value received under the contract, a complainant undertaking to rescind a contract of purchase of stock, under which he paid certain money, and demanding a return of the money, is not entitled to rescission, where the existence of none of the grounds of rescission is shown, and complainant has not complied with the prescribed rules governing rescission.—*Cotter v. Butte & Ruby Valley Smelting Co.*, 129.

## Stock—Stockholders—Instructions—Findings

7. Where plaintiff rescinded a contract of purchase of stock and demanded a repayment of the money after he had been recognized as a stockholder and voted the stock, a finding for defendant was justified under an instruction that if plaintiff paid the money with the understanding that he was to receive stock, and defendant failed to deliver to him the stock in a reasonable time, the jury should find for plaintiff.—*Cotter v. Butte & Ruby Valley Smelting Co.*, 129.

## To Pay Debts of Another—Writing.

8. A promise by partners to pay an existing debt of a corporation to another in consideration of such other person giving them an agency for sale of his coal is an original obligation, which, under Civil Code, Section 3612, Subd. 3, need not be in writing.—*McCormick v. Johnson et al.*, 266.

## Partnership—Evidence.

9. Where defendants claim that a certain contract was made with plaintiff's firm, which plaintiff denies, and according to defendants' claim it was made with both members of the firm, evidence as to whether plaintiff authorized his partner to enter into the contract for the firm is immaterial.—*McCormick v. Johnson et al.*, 266.

## To Pay Debt of Another—Evidence.

10. Defendants who, in an action against them for commissions earned by a firm, claim that for a valuable consideration the firm agreed to pay the debt of an insolvent corporation to them, may testify that they received nothing from the assignee of the corporation.—*McCormick v. Johnson et al.*, 266.

## Proposal—Acceptance.

11. An order for "choice" potatoes is not an acceptance of a proposal to sell "nice white potatoes (Peerless stock)."—*Brophy v. Idaho Produce & Provision Co.*, 279.

## Proposal—Variation—Acceptance.

12. Where a proposal offered for sale ten cars of "nice white potatoes (Peerless stock)," an order of purchase requiring the seller to select the stock and send no small ones constituted a variation from the proposal, and was not an acceptance.—*Brophy v. Idaho Produce & Provision Co.*, 279.

## Proposal—Acceptance—Variation.

13. A proposal to sell ten carloads of potatoes is not accepted by an order for potatoes which requires the cars to average 30,000 pounds, but such condition constitutes a variation from the proposal.—*Brophy v. Idaho Produce & Provision Co.*, 279.



14. A proposal to sell ten cars of potatoes for winter use is not accepted by an order of eight cars for winter storage.—*Brophy v. Idaho Produce & Provision Co.*, 279.

Elements to be Agreed Upon.

15. In order to constitute a binding contract, the terms of payment, as well as the other elements of the contract, must be agreed upon.—*Brophy v. Idaho Produce & Provision Co.*, 279.

Option to Purchase—Mines—Price—Installment—Return—Forfeiture.

16. Where plaintiffs gave an option to purchase their mining property by the payment of the price in installments at certain dates, time being of the essence, they were not required, on declaring a forfeiture for failure to pay the price as required, to return an installment paid.—*Merk et al. v. Bowery Mining Co.*, 298.

Option to Purchase—Mines—Time—Essence.

17. Time is of the essence of an option to purchase mining property.—*Merk et al. v. Bowery Mining Co.*, 298.

Leases—Mines—Extension—Modification.

18. A contract leasing and giving an option to purchase mining property provided for the payment of royalties and of the price in installments if the option should be exercised, and declared that, if the lessee should not perform all the conditions, the agreement should be "void *ab initio*." An extension of time for the payment of installments was given, the supplemental agreement granting it providing that, if the lessee should fail to comply with the contract as modified, such failure should cause a forfeiture. Held, that this modified the provision of the original contract that failure to perform should render it void *ab initio*.—*Merk et al. v. Bowery Mining Co.*, 298.

Medical Services—Open Account.

19. Where two of the three causes of action alleged in a complaint were actions on an open account for medical services rendered in B. county, and not on express contracts to render such services, plaintiff was not entitled to sue thereon in B. county, under Section 613, Code of Civil Procedure.—*Bond v. Hurd*, 314.

Abstracts—Omission of Unsatisfied Judgment—Privty.

20. Where, though defendant abstract company had arrangements with plaintiff loan association by which abstracts were furnished at the cost of borrowers from the association, to be used by plaintiff, defendant agreed to furnish the abstract in question for plaintiff, and delivered the same, knowing that it was made for plaintiff's exclusive benefit and use, and that plaintiff would rely thereon, there was sufficient privty of contract to enable plaintiff to recover damages sustained by reason of a failure of the abstract to disclose an unsatisfied judgment against the land referred to therein.—*Western Loan & Savings Co. v. Silver Bow Abstract Co.*, 448.

Written Evidence—Contents—Proof.

21. Before evidence of the contents of a written contract can be admitted, the absence of the original agreement must be accounted for.—*Watson et al. v. Colusa-Parrot M. & S. Co.*, 513.

## Corporations—Directors—Creditors of Corporation—How Viewed by Courts.

22. Directors of a corporation may become its creditors and enforce their claims against the corporation by the same methods as any other creditors, but in all such cases the contract is viewed with distrust by the courts, and is subject to the strictest scrutiny, and may be enforced only when it is fair and equitable.—*Coombs et al. v. Barker et al.*, 526.

## CONTRIBUTORY NEGLIGENCE.

See NEGLIGENCE.

## CONVERSION.

## Pleadings—Complaint.

1. The complaint did not state a cause of action in conversion, as it did not show a general or special ownership in the property and a right to immediate possession at the time of the wrongful taking by defendant.—*Glass et al. v. Basin & Bay State M. Co.*, 21.

## Chattel Mortgages—Sale by Mortgagee.

2. Where a mortgagee of a chattel rightfully in possession thereof sells it to another, the mortgagor, who has neither paid nor tendered the mortgage indebtedness, has no right of possession such as to entitle him to maintain conversion against the purchaser.—*Potter v. Lohse*, 91.

## Pleadings—Inconsistent Defenses.

3. A defendant may plead inconsistent defenses in the same answer, and may rely on them at the trial, subject to instructions as to their proper effect. Thus defendant in conversion may assert rights as absolute owner and as mortgagee.—*Potter v. Lohse*, 91.

## Set-Off—Judgments—Remedy—Equity.

4. Under Code of Civil Procedure, Section 691, providing that a counterclaim must arise out of the transaction set forth in the complaint, as the foundation of plaintiff's claim, or connected with the subject of the action, a judgment cannot be set off against an action of conversion, but defendant's remedy is by bill in equity or other proceeding to offset one judgment against the other.—*Potter v. Lohse*, 91.

## Mortgages—Parties.

5. In an action for conversion by the mortgagor of a chattel against a purchaser from the mortgagee, who has theretofore become subrogated to the rights of such mortgagee by operation of law, the mortgagee is not a necessary party to give defendant complete protection against plaintiff.—*Potter v. Lohse*, 91.

## Chattel Mortgages—Instructions.

6. In conversion by a mortgagor of a chattel against a purchaser from the mortgagee who was rightfully in possession, a charge to find for plaintiff if he was the owner of the property and defendant had knowledge of his rights, was erroneous, as ignoring the question of plaintiff's right to possession.—*Potter v. Lohse*, 91.

## CONVEYANCES.

See, also, DEEDS, 1.  
WATER RIGHTS, 3, 5.  
APPURTENANCES, 3, 5.

**Mortgages—Chattel Interest.**

1. While a mortgage is a conveyance (Section 1642, Civil Code), it is a conveyance of only a chattel interest.—*Mueller v. Renkes*, 100.

**Consideration—Inadequacy.**

2. Mere inadequacy of consideration is not of itself sufficient cause to invalidate a conveyance, except in extreme cases.—*Mueller v. Renkes*, 100.

**From Daughter to Mother—Fraud—Insufficiency.**

3. The mere fact that a conveyance of land is from a daughter to her mother, or *vice versa*, is not sufficient to stamp it with fraud.—*Mueller v. Renkes*, 100.

**Consideration—Nominal—Fraud.**

4. Where the owner of land conveyed the same to one to whom the owner was indebted for advances, the real consideration being \$2,100, and between \$800 and \$1,200 having been paid on the execution of the deed, the balance being covered by the advances, though the nominal consideration in the deed was only \$1, such conveyance was not fraudulent as to creditors.—*Mueller v. Renkes*, 100.

**Mortgages—Deed Absolute on Its Face.**

5. No conveyance absolute on its face can be a mortgage unless made to secure the payment of a debt or the performance of a duty.—*Morrison v. Jones et al.*, 154.

**Title—Duty of Purchaser to Examine.**

6. In the ordinary contract of purchase and sale there is an implication that the conveyance to be made thereunder will transfer the title to the property, but, in the absence of any special agreement, it is incumbent upon the vendee to examine the title for himself, and to point out any objections he may have to the title tendered him by the vendor.—*Goodell v. Sanford et al.*, 163.

## CORPORATIONS.

See, also, RECEIVERS, 1.

**Stock—Contract of Purchase—Rescission—Instructions.**

1. Where plaintiff rescinded a contract of purchase of stock and demanded a repayment of the money after he had been recognized as a stockholder and voted the stock, a finding for defendant was justified under an instruction that if plaintiff paid the money with the understanding that he was to receive stock, and defendant failed to deliver to him the stock in a reasonable time, the jury should find for plaintiff.—*Cotter v. Butte & Ruby Valley Smelting Co.*, 129.

**Stock—Delivery—Estoppel.**

2. Where a company recognized plaintiff as a stockholder, and he was permitted to vote the stock at stockholders' meetings, he was estopped to deny a delivery of the stock to him and acceptance of it.—*Cotter v. Butte & Ruby Valley Smelting Co.*, 129.

Stockholders—Prior to Delivery of Stock.

3. One can be a stockholder prior to the issuance and delivery to him of certificates of stock. The mere issue of the certificates of stock to him would but furnish him with evidence of his ownership.—*Cotter v. Butte & Ruby Valley Smelting Co.*, 129.

Foreign—Licenses—Expiration—Renewal—Abstracts.

4. Where plaintiff, a foreign corporation, was licensed to do business in Montana at the time it contracted with defendant abstract company for the preparation of an abstract, and it was not contended that plaintiff had not complied with the law at the time the mortgage taken on the faith of such abstract was foreclosed, and at the time action was brought to recover damages sustained from an omission in such abstract, it was immaterial that a short period existed in the meantime, during which plaintiff's license to do business had expired, and remained unexpired.—*Western Loan & Savings Co. v. Silver Box Abstract Co.*, 448.

Contracts—Election of Directors.

5. Plaintiffs could not recover as on a contract, as the alleged contract was illegal, under Civil Code, Section 431, requiring directors of the corporation to be elected annually by the stockholders or members, and Section 2240, declaring that unlawful which is contrary to an express provision of the law.—*Glass et al. v. Basin & Bay State M. Co.*, 21.

Receivers—Appeal—Election—Application of Property.

6. Where a corporation prosecuted an appeal from orders appointing a receiver and authorizing the sale of certain of its property on which such orders were reversed, such appeal constituted an election by the corporation to have the property restored to it or applied to its benefit, and the application of such property to judgments recovered against the corporation constituted an application of the property to the corporation's benefit.—*Lutcy et al. v. Clark et al.*, 45.

Warehouses.

7. Under Subdivision 25 of Section 393 of the Civil Code, a corporation may be organized for the purpose of storing goods in a warehouse for shipment.—*Orient Insurance Co. v. Northern Pac. Ry. Co.*, 502.

Directors—Stockholders—Fiduciary Relation.

8. Directors of a corporation stand, in equity, in a fiduciary relation to the corporation and stockholders, and are not allowed to profit by virtue of their position.—*Coombs et al. v. Barker et al.*, 526.

Directors—Profits—Trustees.

9. If by their acts the directors of a corporation have received any profits from the company's property or business, they hold the same as trustees for the benefit of the corporation and its stockholders.—*Coombs et al. v. Barker et al.*, 526.

Directors—Transactions Voidable—When.

10. Transactions had by a director of a company with reference to its property, whereby he obtains a profit, are voidable by the company or its stockholders, if action is taken within a reasonable time.—*Coombs et al. v. Barker et al.*, 526.

**Directors—Bona Fide Transactions—Burden of Proof.**

11. The burden is on directors of a corporation to show that transactions had by them with the corporation, from which they make a profit, are fair and *bona fide*.—*Coombs et al. v. Barker et al.*, 526.

**Directors—May Become Creditors of Corporation.**

12. Directors of a corporation may become its creditors and enforce their claims against the corporation by the same methods as any other creditors, but in all such cases the contract is viewed with distrust by the courts, and is subject to the strictest scrutiny, and may be enforced only when it is fair and equitable.—*Coombs et al. v. Barker et al.*, 526.

**Directors—Purchasers—Judicial Sales of Corporate Property.**

13. A director of a corporation may become a purchaser of its property at a judicial sale, when such sale is made by another creditor, and when the director has no control over the proceedings; or he may purchase from a purchaser at a judicial sale, but the acts of the purchasing director must be fair and honest, in either case, and he must not be permitted to obtain a dishonest advantage over the corporation or its stockholders.—*Coombs et al. v. Barker et al.*, 526.

**Redemption of Corporate Property by Directors.**

14. A redemption, by the directors of a corporation of corporate property, sold under execution, could not be deemed fair and *bona fide* where the judgment under which the redemption was made was rendered in favor of one of their number only two days before the redemption, on a default based upon the acceptance of service of summons by another of their number.—*Coombs et al. v. Barker et al.*, 526.

**Redemption of Corporate Property by Directors—Third Persons.**

15. One who joined with the directors of a corporation, knowing that they were directors, in the redemption of corporate property, was charged with knowledge of the principle of law that such directors could not redeem the property in their own names.—*Coombs et al. v. Barker et al.*, 526.

**Directors—Breach of Duty—Fraud in Law.**

16. A breach of official duty on the part of the directors of a corporation is fraud in law, and sufficient to warrant relief if proven, though no fraud in fact is alleged.—*Coombs et al. v. Barker et al.*, 526.

**Redemption of Corporate Property—Directors—Third Persons—Fraud.**

17. One who was present at the time the redemption of property was agreed upon between directors of the corporation which owned the property, and who took part in the redemption, was charged with knowledge that the transaction was constructively fraudulent as against the corporation and its stockholders, and stood in no better position than the directors involved.—*Coombs et al. v. Barker et al.*, 526.

**Directors—Redemption of Corporate Property—Agent—Good Faith—Evidence.**

18. Evidence held insufficient to show that one who joined with directors, through an agent, in redeeming corporate property was a *bona fide* purchaser for value, without notice of the unlawful acts of the directors, and for a valuable consideration paid before he acquired such notice.—*Coombs et al. v. Barker et al.*, 526.

**Directors—Redemption of Mining Property and Working Same as Their Own—Accounting.**

19. Where directors redeemed corporate mining property, sold under execution, and held and worked it as their own, they were entitled, on being sued by the stockholders, to obtain an accounting and to a credit for whatever money they had actually paid out for the use and benefit of the company, such as money paid for the redemption of the property. In satisfaction of *bona fide* claims against the same, with interest, and also for the reasonable expenses of extracting ore from the property after redemption.—*Coombs et al. v. Barker et al.*, 526.

**Directors—Stockholders—Estoppel—Ratification.**

20. Where it does not affirmatively appear that plaintiff stockholders took part in a meeting or voted their stock, either in person or by proxy, they are not estopped to complain of an unauthorized act on the part of the directors alleged to have been ratified at such meeting.—*McConnell et al. v. Combination M. & M. Co.* (on rehearing), 563.

**Stockholders—Removal of Office to Other State—Consent—Estoppel.**

21. By agreeing to the unauthorized removal of the office of a corporation to a different city and state, stockholders did not estop themselves to complain of the wrongful use by the directors of the corporate funds after such removal.—*McConnell et al. v. Combination M. & M. Co.* (on rehearing), 563.

**Corporations—Directors—Unauthorized Levy of Assessment—Stockholders—Action.**

22. The levy of an assessment by directors of a corporation without observance of the formalities required by law, and the threatened sale of stock as delinquent, are of themselves sufficient to sustain an action by the stockholders against the directors.—*McConnell et al. v. Combination M. & M. Co.* (on rehearing), 563.

**Directors—Relations to Stockholders.**

23. As to the stockholders of a corporation, the directors are trustees, besides being agents of the company and stockholders, and are not permitted to so deal with the trust property as to secure therefrom a profit to themselves.—*McConnell et al. v. Combination M. & M. Co.* (on rehearing), 563.

**Directors—Voting Themselves Salaries—Quorum.**

24. Directors cannot, even under a by-law authorizing it, vote a salary to one of their number, when the vote of such director is necessary to make up a quorum.—*McConnell et al. v. Combination M. & M. Co.* (on rehearing), 563.

**Stockholders' Meetings — Ratification of Officers' Acts Without Information Thereon—Effect.**

25. A resolution passed at a stockholders' meeting, called for the purpose of electing directors only, approving all the acts of the trustees and officers, is not a direct and substantive act on the part of the stockholders, done with the intention of ratifying the action of the board of trustees voting certain of their number salaries, when no statements are presented to the attending stockholders as to the condition of the company, and when it does not appear that they had been informed of the payment of such salaries.—*McConnell et al. v. Combination M. & M. Co.* (on rehearing), 563.

**Money Paid to Directors as Attorney's Fees—To Whom Chargeable.**

26. In an action against the officers and directors of a corporation for fraudulent misappropriation of corporate funds, the fact that sums of money were paid to the president and vice president and charged up to the corporation as attorney's fees, neither the president nor vice president being an attorney and no employment as such by the company having been shown, is not conclusive, and the items should be charged against defendants or not, upon proof of the real purpose for which they were expended.—*McConnell et al. v. Combination M. & M. Co.* (on rehearing), 563.

**Officers—Stockholders' Meetings—Expenses—Chargeable to Whom.**

27. The expenses of the president and vice president of a corporation in attending stockholders' meetings and in visiting directors are not *prima facie* proper charges against the company.—*McConnell et al. v. Combination M. & M. Co.* (on rehearing), 563.

**Political Expenses—To Whom Chargeable.**

28. Expenses of lobbying a bill through the legislature, incurred by directors of a corporation, are not proper charges against the company, and the non-assenting stockholders are entitled to have the directors account to the corporation for money so expended.—*McConnell et al. v. Combination M. & M. Co.* (on rehearing), 563.

**Power of Directors to Incur Necessary Office Expenses.**

29. It is within the power of directors of a corporation to employ a secretary and pay him a salary, and to incur necessary expenses for offices and office help; but expenses charged by the directors as having been incurred for such purposes during the time when the corporation was not engaged in active operations should be explained.—*McConnell et al. v. Combination M. & M. Co.* (on rehearing), 563.

**Action Against Officers by Minority Stockholders—Expenses—To Whom Chargeable.**

30. Directors of a corporation cannot charge to the corporation expenses incurred by them in defending a suit brought by minority stockholders against them for a fraudulent misappropriation of the company's funds, although the company is made a nominal defendant.—*McConnell et al. v. Combination M. & M. Co.* (on rehearing), 563.

**Mismanagement by Employees—Loss—To Whom Chargeable.**

31. Loss occasioned by the mismanagement of an employe of a corporation or by a natural shrinkage in the value of supplies is not *prima facie* chargeable to the directors, unless it is apparent that they knowingly and willfully allowed the employe to pursue a course of action with reference to the business from which resulting loss would be equivalent to misappropriation of the assets of the company.—*McConnell et al. v. Combination M. & M. Co.* (on rehearing), 563.

**Directors—Not Insurers or Guarantors of Success or Profit.**

32. Directors of a corporation are not insurers of the corporate property, nor guarantors that the enterprise undertaken by the corporation shall be successful and profitable.—*McConnell et al. v. Combination M. & M. Co.* (on rehearing), 563.

## Directors—Power to Incur Proper Office Expenses.

33. Directors of a corporation are *prima facie* empowered to maintain an office at the place designated in the charter for the principal office of the corporation, and a rent charge occasioned for that purpose, so far as reasonable, may be charged against the corporation.—*McConnell et al. v. Combination M. & M. Co.* (on rehearing), 563.

## Directors—Power to Borrow Money—Assessments—Current Charges.

34. It is the duty of directors of a corporation to obtain money to pay current charges, either by borrowing the necessary funds or by levying assessments upon the stockholders, and the obligation of the corporation to repay money borrowed by the directors is not affected by the fraudulent diversion of part of the money by the directors, even though some of the requirements of the by-laws, as to the execution of evidences of indebtedness, were not strictly complied with.—*McConnell et al. v. Combination M. & M. Co.* (on rehearing), 563.

## Corporate Notes—Directors—Fraud—Action—Banks—Necessary Parties.

35. Corporate notes executed by the directors to a bank cannot be set aside for fraud or any other reason, in an action by stockholders against the directors to which the bank has not been made a party.—*McConnell et al. v. Combination M. & M. Co.* (on rehearing), 563.

## Judgment for President Against Corporation—Proper Charge—When.

36. A judgment obtained by the president of a corporation against the corporation for money expended by him for it, is a charge against it, to be satisfied out of the assets of the company, after such officer has accounted for funds misappropriated by him as president.—*McConnell et al. v. Combination M. & M. Co.* (on rehearing), 563.

## COSTS.

## Consolidated Actions.

1. Where actions are consolidated as authorized by Code of Civil Procedure, Section 1894, the court should determine what costs, if any, should be charged to either party in the original suits, costs subsequently accruing being taxable only in the consolidated action.—*Handley v. Sprinkle*, 57.

## Verdict—Judgment.

2. Where a verdict as directed by the court and returned was for the defendant for costs, the court had no power to render judgment in favor of defendant for costs, and for damages claimed in an untried counterclaim.—*Duane v. Molnuk*, 343.

## COUNTY ATTORNEYS.

## Criminal Law—Argument—Objection—Appeal.

1. On a criminal prosecution, the county attorney made certain statements as to what, in his opinion, the evidence showed. Objection was made to such line of argument, and the court said that the county attorney had a right to state his theory of the case, and what the evidence showed, or tended to show, as a matter of argument, but that the jury should understand that what he had said was in argument, and not as a statement of fact. *Held*, that such remarks of the court were not erroneous.—*State v. Tully*, 365.



## COUNTY SUPERINTENDENT OF SCHOOLS.

See SCHOOLS.

## CRIMINAL LAW.

**Burglary—Description of Premises**

1. Where an information for burglary charges the willful entry of a certain house in the rear of No. 111 East Broadway street, owned by J. K., and it appears that the house burglarized was No. 111 and occupied by M. K., but was situated on the rear of the lot, and there was no other house thereon, accused was not prejudiced by the description or the evidence of ownership.—*State v. Rogers*, 1.

**Burglary—Information—Imperfection in Form.**

2. Under Penal Code, Section 1842, providing that no information is insufficient, nor can the judgment be affected for any imperfection in matter of form, which does not prejudice defendant's substantial rights on the merits, a conviction for burglary will not be disturbed because it appears it was committed on a day prior to that alleged in the information, where defendant was not prejudiced.—*State v. Rogers*, 1.

**Burglary—Evidence—Cross-Examination.**

3. Where certain witnesses for defendants in a prosecution for burglary testified that defendants resided with their mother at Centerville, it was not erroneous to allow them to be cross-examined as to whether or not defendants had been arrested in a house in Butte, or did not maintain a room there, as showing that they resided there instead of with their mother.—*State v. Rogers*, 1.

**Burglary—Cross-Examination—Degrading and Discrediting Witness.**

4. Where, in a prosecution for burglary, a witness who was jointly indicted with defendant testified to having taken a fishing trip with defendant about the time of the burglary, questions on cross-examination to show that the trip was for the purpose of committing robbery were improper, as tending to degrade and discredit the witness and defendant, though the witness answered in the negative.—*State v. Rogers*, 1.

**Information—Venue—Military Reservations.**

5. An information stating generally that a crime was committed in Missoula county, but containing no other allegation as to venue, is sufficient: It not being necessary that it should allege that the crime was not committed on the Fort Missoula military reservation, which is situated within that county.—*State v. Tully*, 365.

**Arrest of Judgment—Defect in Information.**

6. A motion in arrest of judgment must be founded on some defect in the information mentioned in Section 1922, Penal Code.—*State v. Tully*, 365.

**Arrest of Judgment—Extrinsic Evidence.**

7. Extrinsic evidence cannot be received at a hearing on a motion in arrest of judgment.—*State v. Tully*, 365.

## Homicide—Military Reservation—Jurisdiction.

8. *Held*, that neither title to, nor sovereignty over, that part of section 36, township 13, N. R. 20 W., upon which some of the buildings of Fort Missoula were erected, ever passed to the state of Montana under Act of Congress of February 22, 1889, granting land to the proposed state of Montana, and hence that the state court had no jurisdiction over a homicide committed on such part of said section 36.—*State v. Tully*, 365.

## County Attorney—Argument—Objection—Appeal.

9. On a criminal prosecution, the county attorney made certain statements as to what, in his opinion, the evidence showed. Objection was made to such line of argument, and the court said that the county attorney had a right to state his theory of the case, and what the evidence showed, or tended to show, as a matter of argument, but that the jury should understand that what he had said was in argument, and not as a statement of fact. *Held*, that such remarks of the court were not erroneous.—*State v. Tully*, 365.

## Murder—Information—Sufficiency.

10. Under the Penal Code of Montana, an information charging that accused committed a murder willfully, unlawfully, feloniously and premeditatedly, and of his malice aforethought, charges murder in the first degree, though it fails to use the word "deliberately."—*State v. Hiltboka*, 455.

## CROPS.

See LANDS, 1, 3, 4.

## DECLARATIONS.

## Lost Wills—Presumption of Revocation.

1. Declarations of the testator, when not a part of the *res gestae*, are inadmissible, in conjunction with testimony of witnesses who had seen a lost will, to overcome the presumption of revocation from the fact that the will was last seen in his possession when he was in the exercise of his mental faculties.—*In re Colbert's Estate*, 461.

## DEEDS.

See, also, WATER RIGHTS, 5.

## To Land—What Is Conveyed—Water Rights.

1. A deed of land, together with all appurtenances, water rights and water ditches to the same belonging, and all the estate, title, interest, claim or demand of the grantor therein, conveys only such water rights as are appurtenant to the land.—*Hays v. Buzard et al.*, 74.

## When Not Mortgage—Security for Debt.

2. A lease and option to purchase was assigned to secure a debt, the assignee to collect and account for the rents. Later the assignor deeded to the assignee, for a consideration much larger than the original debt, all her right and title to the property, the assignee agreeing to reassign if the assignor should pay him the consideration expressed in the deed before exercise of the option, and to reassign thereafter on payment of a larger sum. *Held*, that the deed was not a mortgage, there being no debt secured.—*Morrison v. Jones et al.*, 154.

## Mortgages—Nonsuit—Equitable Action.

3. In an action to have a deed declared a mortgage the court may, on defendant's motion for a nonsuit, decree the instrument to be a deed, though there is no technical nonsuit in an equitable action.—*Morrison v. Jones et al.*, 154.

## Failure to Record—Taxes—Payment—Notice.

4. Payment of taxes by the grantee in an unrecorded deed is not notice to a subsequent purchaser.—*Sheldon v. Powell*, 249.

## Not of Record—Notice—Burden of Proof.

5. The burden is on the grantee in an unrecorded deed to show that a subsequent purchaser had notice.—*Sheldon v. Powell*, 249.

## Conveyance—Security for Loan—Fraud.

6. After conveyance to plaintiff by a deed which was not recorded, the grantor applied to defendant for a loan on the land, stating that it was fenced, and a part of it plowed. Defendant examined the title, and went to the land, finding more plowed than had been represented, and also that the fence inclosed other land which belonged to plaintiff. *Held*, that defendant was guilty of no fraud in taking a conveyance of the land as security for the loan.—*Sheldon v. Powell*, 249

## DEFAULT.

## Striking Answer from Files—Practice.

1. An answer filed after defendant's default for failure to answer has been entered will be stricken from the files; the proper practice being to move to set aside the default, tendering the answer with the motion.—*Mantic v. Casey et al.*, 408.

## Surprise—Excusable Neglect—Practice.

2. The failure of defendant's counsel to know that a special appearance to move to quash the service of summons did not extend the time for a general appearance and answer, is not such surprise or excusable neglect as is contemplated by Code of Civil Procedure, Section 774, as a reason for setting aside a default.—*Mantic v. Casey et al.*, 408.

## DEFENSES.

See, also, NEGLIGENCE.

## Equitable—Subrogation—Pleadings.

1. Subrogation—an equitable defense—may be pleaded to a legal cause of action.—*Potter v. Lohse*, 91.

## Inconsistent—Pleadings—Conversion.

2. A defendant may plead inconsistent defenses in the same answer, and may rely on them at the trial, subject to instructions as to their proper effect. Thus defendant in conversion may assert rights as absolute owner and as mortgagee.—*Potter v. Lohse*, 91.

## DIRECTORS.

See CORPORATIONS.

STOCK AND STOCKHOLDERS.

## DISTRICT COURTS.

See, also, PROBATE COURTS.

## Judicial Notice—Location and Numbering of Buildings in Cities.

1. The court cannot take judicial notice of the system employed by cities in numbering houses, nor of the relative location of buildings, nor whether there are buildings on certain lots and blocks.—*State v. Rogers*, 1.

## Municipal Corporations—Current Expenses—Review—Fraud.

2. Under Session Laws 1903 page 42, providing that, even after a city has reached the constitutional limit of indebtedness, it still has power to pay its reasonable and necessary current expenses out of the cash in its treasury, the determination of what is a current expense is for the courts; but the determination of the city council as to whether a particular current expense, is reasonable and necessary is not subject to review by the courts in the absence of fraud or abuse of discretion.—*Helena Water Works Co. v. City of Helena et al.*, 243.

## Appeal—Justice Courts—Jurisdiction.

3. Under Code of Civil Procedure, Section 1761, providing that all appeals from the justice's court must be tried anew in the district court, that court sits as a justice of the peace in that case, and with no greater jurisdiction, and either party may have reviewed any question of law or fact which was raised before the justice and presented to the district court.—*State ex rel. Grissom v. Justice Court et al.*, 238.

## Complaint—Relief That May be Granted.

4. Under Code of Civil Procedure, Section 1003, providing that the court may grant relief consistent with the complaint, a prayer for such other and further relief as may be meet and agreeable to equity and good conscience warrants the granting of any relief to which plaintiff is entitled on the allegations and proof.—*Merk et al. v. Bowery Mining Co.*, 298.

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## Exceptions to Remarks—Appeal.

6. Where no exception was taken to remarks of the court in ruling on an objection to an argument of counsel, the matter could not be considered on appeal.—*State v. Tully*, 365.

## New Trial—Newly Discovered Evidence—Discretion.

7. Applications for new trials on the ground of newly discovered evidence are addressed to the sound, legal discretion of the trial judge, and his action thereon will not be disturbed on appeal, except for a clear and unmistakable abuse of such discretion.—*In re Colbert's Estate* (on rehearing), 477.

## Jurisdiction—Divorce—Alimony—Appeal—Contempt.

8. An action for divorce is still in the district court, notwithstanding pendency of an appeal, so as to authorize that court, by contempt proceedings, to compel obedience to its order for payment of alimony.—*State ex rel. Bordeaux v. District Court et al.*, 511.

## DIVORCE.

See ALIMONY, 1, 2, 3.

## DOWER.

Partition—Wife of Tenant-in-Common—Indispensable Party.

1. Under Code of Civil Procedure, Section 1342, the wife of a defendant tenant-in-common, having an inchoate right of dower in an undivided share of the property, is an indispensable party to a suit for partition.—*Hurley v. O'Neill*, 595.

## ELECTION.

See CORPORATIONS, 2.  
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## ELECTIONS.

Contest—Statement—Affidavit—Verification.

1. Under Code of Civil Procedure, Section 2014, requiring that a person contesting an election shall file a statement setting forth certain facts and the particular grounds of such contest, verified by the affidavit of the contesting party that the matters therein contained are true, an affidavit was sufficient, though the grounds on which the contest was based were alleged on information and belief.—*Murphy v. Leregood*, 34.

Contest—Statement—Contents.

2. Code of Civil Procedure, Sections 2021, 2016, permitting the court to dismiss proceedings contesting an election, if the statement of the cause of contest is insufficient, and declaring that no statement of the grounds of contest will be rejected, nor the proceedings dismissed for want of form, if the grounds are alleged with such certainty as to advise defendant of the particular cause for which such election is contested, merely require that the contestant shall definitely apprise the contestee of the charges relied on, so that he may be prepared to meet them with appropriate proof.—*Murphy v. Leregood*, 34.

County School Superintendent—Tie Vote—Vacancy.

3. Where there was a tie vote on an election for school superintendent of a county, such vote did not render the office vacant; the previous incumbent being entitled to hold the same until a superintendent was regularly elected.—*State ex rel. Chenoweth v. Acton*, 37.

Tie Vote—County Officers—Appointment—Statutes—Constitutionality.

4. Political Code, Section 1171, providing that in case of a tie vote for a county officer, except county commissioner, the county commissioners shall appoint some eligible person to fill the office, as in case of other vacancies in such office, in so far as it relates to officers named in Constitution, Article XVI, Section 5, providing that such officers shall hold their offices for two years, and until their successors are elected and qualified, is invalid, as in contravention of such section.—*State ex rel. Chenoweth v. Acton*, 37.

Powers of State Conventions—Right to Place on Official Ballot.

5. Where there were contending factions of the democratic party in a certain county, and the state convention admitted the delegates of both fac-

## DISTRICT COURTS.

See, also, PROBATE COURTS.

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Powers of State Conventions—Right to Place on Official Ballot.

5. Where there were contending factions of the democratic party in a certain county, and the state convention admitted the delegates of both fac-

tions into the convention, and gave to each delegation the right to cast one-half the vote of such county, but no nominations had been made at the time the state convention was held by either of such county factions, the state convention, while it had the power to admit both contesting delegations, could not lawfully decide in advance that the nominees at subsequent conventions of either faction should be considered the regular nominees of the democratic party of such county, and entitled to have their names on the official ballot as "democratic."—*State ex rel. Riley v. Weston*, 218.

#### Statutes—Ballot.

6. Session Laws 1901, amending the election law to the extent of removing the circle from the head of each ticket, thereby preventing a voter from voting a straight ticket by marking in the circle, in no wise amends the rule that only one ticket shall appear on a ballot under a particular party designation.—*State ex rel. Riley v. Weston*, 218.

#### County Conventions—Contesting Delegations.

7. The county committee of a political party duly called a convention at a certain time and place. The convention regularly organized, and placed in nomination candidates. A contesting delegation claimed that they were excluded from participation in the convention, and thereupon nominated certain other nominees, which they claimed were entitled to the party designation on the official ballot. The county convention was regularly called to order, and opportunity given to contestants to present their credentials. The contesting delegates made no attempt to be admitted by presenting their credentials, but proceeded to organize another convention. *Held*, that the nominees of the independent convention were not entitled to have their names placed on the official ballot instead of the nominees of the regular convention.—*State ex rel. Riley v. Weston*, 218.

#### Nominations—Certificate—Time of Filing.

8. Political Code, Section 1316, requiring certificates of nomination to be filed with the secretary of state not more than sixty nor less than thirty days before election, is mandatory, and a certificate of original nominations made by a party convention cannot be filed less than thirty days before election.—*State ex rel. Galen v. Hays*, 227.

#### Nominations—Certificate.

9. Under Political Code, Section 1311, relative to the filing of certificates of convention nominations, and providing that the certificate of nomination, which must be in writing, must contain the name of each person nominated, his residence, etc., all convention nominations of one party must be contained in a single certificate, and a separate certificate for each nominee cannot be filed.—*State ex rel. Galen v. Hays*, 227.

#### Nomination Certificates—Vacancy—How It May be Filled.

10. Political Code, Section 1311, provides for the filing with the secretary of state of a certificate of the nominations made by party conventions, and Section 1320 provides that, if any certificate of nomination is or becomes insufficient the vacancy may, if the original nomination was made by a party convention which had delegated to a committee the power to fill vacancies, be filled by such committee. *Held*, that an inadvertent failure to include the name of a convention nominee for a certain office in the certificate of nominations renders that certificate insufficient, within the meaning of Section 1320, and entitles the proper committee to fill the vacancy.—*State ex rel. Galen v. Hays*, 227.



**Mass Convention—Nominations.**

11. A call for a mass convention of electors stated that the object was to organize central committees opposed to corporate rule, and to give the voters of the state an opportunity to vote for men free from corporate control, and did not state that the convention was to assemble to nominate candidates for any office whatever. *Held*, not a call of the electors of the state to assemble and select candidates for public office.—*State ex rel. Athey v. Hays*, 233.

**Mass Convention May Make Nominations—When.**

12. Under Political Code, Section 1310, a mass convention of electors can make nominations of candidates for public office only when such convention was called for that purpose.—*State ex rel. Athey v. Hays*, 233.

**Mass Convention—Committee—Nominations.**

13. If a mass convention of electors could not make nominations for public office because the call of the convention did not set forth such purpose, a committee appointed by such convention could not make such nominations.—*State ex rel. Athey v. Hays*, 233.

**Mass Convention—Committee—Nominating Two Tickets—Ballots.**

14. Under Political Code, Section 1314, where the same committee appointed by a mass convention nominated two tickets, composed of different persons as candidates for the same offices, both tickets were void, and neither can appear on the official ballot.—*State ex rel. Athey v. Hays*, 233.

## EQUITY.

**Fraud—Notes—Sufficiency of Bill.**

1. Where a bill to set aside a note, secured by a chattel mortgage, on the ground of fraud, alleged facts showing a mere failure of consideration for the note, and did not allege either that defendant was insolvent, that plaintiff did not have an adequate remedy at law, or that defendants had threatened to dispose of the note before maturity to a *bona fide* purchaser, but alleged that defendant was in possession thereof and refused to deliver the same to plaintiff, it was insufficient.—*Handley v. Sprinkle*, 57.

**Judgment Will Not be Reversed—When.**

2. In an equity case, the judgment will not be reversed merely on the ground that some irrelevant or immaterial evidence was admitted at the hearing.—*Hays v. Buzard et al.*, 74.

**Questions of Fact—Review—Water Rights—Findings.**

3. Under Laws of Second Extraordinary Session 1903, p. 7, authorizing the supreme court to review all questions of fact and of law in equity cases, in a suit to determine water rights, the findings will not be disturbed because of the erroneous admission of evidence, where the remainder of the evidence preponderates in favor of the findings.—*Hays v. Buzard et al.*, 74.

**Subrogation—Pleading.**

4. Subrogation—an equitable defense—may be pleaded to a legal cause of action.—*Potter v. Lohse*, 91.

## Set-Off—Conversion—Judgments—Remedy.

5. Under Code of Civil Procedure, Section 691, providing that a counter-claim must arise out of the transaction set forth in the complaint as the foundation of plaintiff's claim, or connected with the subject of the action, a judgment cannot be set off against an action in conversion, but defendant's remedy is by bill in equity or other proceeding to offset one judgment against the other.—*Potter v. Lohse*, 91.

## New Trial—Notice of Intention—Time of Filing.

6. In an equity case, it is essential to the validity of a motion for a new trial that the notice of intention be filed within ten days *after notice of the decision of the court*.—*Spencer v. Hersam et al.*, 120.

## Fraud—Mistake of Law—Variance.

7. Civil Code, Section 2123, provides that a court of equity will relieve against a mistake of law when it arises (1) from a misapprehension of the law by all parties by supposing that they knew or understood it, and by making substantially the same mistake, or (2) a misapprehension of the law by one party of which the others are aware at the time of contracting, but which they do not rectify. *Held*, that where plaintiff brought suit under the second subdivision to recover an overpayment made on a repurchase of property sold under foreclosure, and alleged that she made the payment under misapprehension as to her legal right to redeem, and that the payment was caused to be made through the fraud, conspiracy and deceitful practices of the defendants, but the proof showed that whether plaintiff had a right of redemption at the time was a mooted question of law, and that defendants acted in good faith in their contention that her right of redemption was barred, there was a fatal variance.—*Bottego v. Carroll et al.*, 122.

## Nonsuit—Deeds—Mortgages.

8. In an action to have a deed declared a mortgage the court may, on defendant's motion for a nonsuit, decree the instrument to be a deed, though there is no technical nonsuit in an equitable action.—*Morrison v. Jones et al.*, 154.

## Nuisances—Action for Damages—Right of Jury Trial—Equitable Relief.

9. Under the Constitution of the United States, Seventh Amendment, in force at the time of the adoption of the Constitution of Montana, and under Article III, Section 23, of the Constitution of Montana, and Code of Civil Procedure, Section 1300, and Civil Code, Sections 4530, 4535 and 4536, plaintiff in an action for damages for the maintenance of a nuisance is entitled to a trial by jury of his right to damages, although he also asks for the equitable relief of injunction to restrain the continuance of the acts complained of.—*Chessman v. Hale*, 577.

## ESTOPPEL.

## Corporations—Stock—Delivery.

1. Where a company recognized plaintiff as a stockholder, and he was permitted to vote the stock at stockholders' meetings, he was estopped to deny a delivery of the stock to him and acceptance of it.—*Cotter v. Butte & Ruby Valley Smelting Co.*, 129.

## Vendees—Trust Agreement—Title—Executors.

2. Beneficiary vendees under a trust agreement, who assented thereto for years, entered into possession, sold portions of the property, made payments

on the price, and in all respects ratified the transaction between the purchasing syndicate, of which they were members, and the vendor, until sued for the balance of the price, were estopped from claiming that they received no title to the property, or that the sale, which was one by an executrix under a power, was irregularly made.—*Goodell v. Sanford et al.*, 163.

#### Jury Commissioners—Jury List—Irrregularity.

3. A member of a jury commission, who, by his own misconduct in office as a member of such commission, has rendered the making of the jury list so irregular that as to others it might be invalid, cannot take advantage of his own wrongdoing when called on to answer a criminal charge presented by a grand jury selected from such jury list.—*State ex rel. Clark v. District Court et al.*, 428.

#### Corporations—Directors—Stockholders—Ratification.

4. Where it does not affirmatively appear that plaintiff stockholders took part in a meeting or voted their stock, either in person or by proxy, they are not estopped to complain of an unauthorized act on the part of the directors alleged to have been ratified at such meeting.—*McConnell et al. v. Combination M. & M. Co.* (on rehearing), 563.

#### Corporations—Consent—Stockholders—Removal of Office to Other State.

5. By agreeing to the unauthorized removal of the office of a corporation to a different city and state, stockholders did not estop themselves to complain of the wrongful use by the directors of the corporate funds after such removal.—*McConnell et al. v. Combination M. & M. Co.* (on rehearing), 563.

#### Executors—Distribution—Acquiescence.

6. An heir who has acquiesced in the settlement and final distribution of an estate, is estopped to call such settlement and distribution in question, or to compel the return of, or an accounting for, the property thus parted with by the executor or administrator in good faith.—*Spencer v. Spencer*, 631.

### EVIDENCE.

#### Burglary—Cross-Examination.

1. Where certain witnesses for defendants in a prosecution for burglary testified that defendants resided with their mother at Centerville, it was not erroneous to allow them to be cross-examined as to whether or not defendants had been arrested in a house in Butte, or did not maintain a room there, as showing that they resided there instead of with their mother.—*State v. Rogers*, 1.

#### Hearsay Testimony—Effect of Sustaining Objection.

2. Where a witness for the prosecution made statements as to what he had heard, and an objection to a further question was sustained because the witness was not testifying from his own knowledge, the ruling practically withdrew the answer to the previous question, and defendant, if he desired a more specific withdrawal, ought to have moved to strike the evidence from the record.—*State v. Rogers*, 1.

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trip was for the purpose of committing robbery were improper, as tending to degrade and discredit the witness and defendant, though the witness answered in the negative.—*State v. Rogers*, 1.

#### Water Rights—Appurtenant to Land.

4. Evidence examined and held to justify the trial court in finding that a certain water right was not appurtenant to a particular piece of land.—*Hays v. Buzard et al.*, 74.

#### Parol—Leases—Purposes for Which Premises Leased.

5. Where there was nothing contained in the description of property in a lease by which it could be determined from the lease itself whether it was intended for occupation by human beings or not, which was one of the issues made by the pleadings, parol evidence was admissible to explain the purpose for which the property was leased, together with its condition and description.—*Landt et al. v. Schneider*, 15.

#### Action for Rent—Letters.

6. A letter written subsequent to the beginning of an action for rent, which did not by its terms ratify any previous act of one of the lessors, was inadmissible for the purpose of showing authority on his part to make a previous agreement with the lessee on behalf of the other lessors.—*Landt et al. v. Schneider*, 15.

#### Extension of Lease—Letters—Agents.

7. A letter written by R. and B., two lessors, to the third lessor, to the effect that they had concluded that R. should go to the place where the third resided, and agree concerning the leased premises, was inadmissible to show that R. had authority to extend the lease as agent of B.—*Landt et al. v. Schneider*, 15.

#### Sufficiency—Record on Appeal.

8. Where it did not appear that the appeal record contained all the evidence introduced at the trial, or the substance thereof applicable to the errors assigned, the supreme court could not review the sufficiency of the evidence to sustain the verdict.—*Landt et al. v. Schneider*, 15.

#### Sufficiency—Bill of Exceptions—Appeal.

9. Under a statute providing that in the settlement of statements and bills of exceptions the court shall eliminate all immaterial evidence, if a bill of exceptions or statement appears to contain all material evidence, or the substance thereof, given on the trial of the case, referring to the points brought before the supreme court for review, that court has full power to consider the sufficiency of the evidence, if properly specified as a ground of error.—*Handley v. Sprinkle*, 57.

#### Equity Case—Judgment—Reversal.

10. In an equity case, the judgment will not be reversed merely on the ground that some irrelevant or immaterial evidence was admitted at the hearing.—*Hays v. Buzard et al.*, 74.

#### Parol—Varying Written Contract—Fraud.

11. Plaintiff alleged mistake and fraud, and the evidence disclosed that the inducement held out to plaintiff to sign an agreement was based on

fraudulent representations of defendants that a lease need not be mentioned in a contract of sale of a business and the lease. *Held*, that evidence was admissible showing the purchase of the lease and defendants' fraudulent conduct, over objection that it varied the contract.—*Sathre v. Rolfe et al.*, 85.

**Parol—Written Contract.**

12. Where a contract of sale of a business omitted reference to a leasehold interest by fraudulent representations of defendants as to the lease being a separate writing, evidence showing the purchase of the leasehold interest was admissible, as being independent and collateral to the portion which was reduced to writing.—*Sathre v. Rolfe et al.*, 85.

**Mines—Personal Injuries—Sufficiency.**

13. In an action against a mine owner for injuries to a miner caused by an explosion, evidence *held* not to justify submission of the issue of defendant's negligence.—*Shaw v. New Year Gold Mines Co.*, 138.

**Deed—Mortgage—Concurrent Agreement—Admissibility.**

14. In an action to have a deed decreed a mortgage, an agreement executed concurrently with the deed, whereby the grantee agreed to reconvey on certain conditions, was properly admitted in evidence.—*Morrison v. Jones et al.*, 154.

**Sustaining of Objection—Effect.**

15. Where plaintiff objected to the introduction of any evidence of conditions subsequent to a certain date, and his objection was sustained, he could not complain of the subsequent limitation of his own evidence to the showing of conditions prior to the date named.—*Murray v. City of Butte*, 177.

**Stipulation—Effect.**

16. A stipulation that certain streets within the boundaries of plaintiff's mining claim were used as public highways prior to the location of such claim, and had ever since been used as such, was, in effect, an admission by plaintiff of defendant's claim that the ground was occupied as a public highway at the time of the location of the claim.—*Murray v. City of Butte*, 177.

**Striking Out—Harmless Error.**

17. Witness was asked whether he had any placer ground prior to 1875, and answered that he did not remember whether he bought a certain person out in 1875 or 1876. The court struck out the portion of the answer "concerning the buying of the placer ground prior to 1875." *Held*, that the ruling was practically without meaning and harmless.—*Murray v. City of Butte*, 177.

**Libel—Malice—Extra Compensation.**

18. In an action by a school teacher for libel, evidence that defendant, after the publication of the alleged libel, had tried to have the certificate of plaintiff as a school teacher revoked, is admissible to show malice, but not as a basis for extra compensation.—*Paaton v. Woodward*, 195.

## Libel—Malice—Extra Compensation.

19. In an action by a school teacher for libel, proof of statements made by defendant after the institution of the suit to the effect that he would take away plaintiff's license as a teacher is admissible to show malice, but not as a basis for extra compensation.—*Parton v. Woodicard*, 195.

## Libel—Motive—Pleadings.

20. In an action for libel it is not error to allow the defendant, as a witness, to be interrogated with respect to his motive in using certain language in the article alleged to be libelous, and to permit him to explain statements therein—whether they were true, and as to the source of his information with respect to their truth—where such facts are involved in the issues presented by the pleadings.—*Parton v. Woodward*, 195.

## Railroads—Killing Live Stock.

21. Where in an action against a railroad under Civil Code, Section 959, the only evidence was that the animals were found near the track, one dead and the other injured so that it had to be killed, and no showing was made as to the character of the injuries except that one had its legs broken, such evidence was insufficient to show that the animals were killed by an engine or cars of defendant.—*Braudin v. Oregon Short Line R. R. Co.*, 238.

## Want—Judgment—Appeal.

22. Want of evidence to support a judgment may be relied on and considered upon an appeal from the judgment.—*Braudin v. Oregon Short Line R. R. Co.*, 238.

## Deeds—Unrecorded—Loan—Security—Fraud.

23. After conveyance to plaintiff by a deed which was not recorded, the grantor applied to defendant for a loan on the land, stating that it was fenced, and a part of it plowed. Defendant examined the title, and went to the land, finding more plowed than had been represented, and also that the fence inclosed other land which belonged to plaintiff. *Held*, that defendant was guilty of no fraud in taking a conveyance of the land as security for the loan.—*Sheldon v. Powell*, 249.

## Appeal—Judgment—Findings.

24. On appeal from the judgment only, the record may be examined to determine whether there is any evidence to support the finding.—*Sheldon v. Powell*, 249.

## Action for Commissions—Agreement to Pay Debt of Another.

25. Evidence in an action for commissions for selling coal *held* sufficient to sustain a finding that plaintiff, in consideration of his agency for defendants, agreed to pay a debt owing them by another.—*McCormick v. Johnson et al.*, 266.

## Sufficiency—Action for Commissions—Findings.

26. Evidence in an action for commissions *held* sufficient to sustain a finding that plaintiff's indebtedness to defendants equaled the amount of the commissions.—*McCormick v. Johnson et al.*, 266.

## Partnerships—Contracts.

27. Where defendants claim that a certain contract was made with plaintiff's firm, which plaintiff denies, and according to defendants' claim it was



made with both members of the firm, evidence as to whether plaintiff authorized his partner to enter into the contract for the firm is immaterial.—*McCormick v. Johnson et al.*, 266.

**Cross-Examination—Harmless Error.**

28. Any error in allowing plaintiff on cross-examination to be asked how a certain account stood is harmless, he having answered that he did not know.—*McCormick v. Johnson et al.*, 266.

**Action for Commissions.**

29. Defendants who, in an action against them for commissions earned by a firm, claim that for a valuable consideration the firm agreed to pay the debt of an insolvent corporation to them, may testify that they received nothing from the assignee of the corporation.—*McCormick v. Johnson et al.*, 266.

**Promise to Pay Debt—Consideration—Statute of Frauds.**

30. Defendants, for the purpose of showing that the promise of plaintiff's firm to pay a debt owing them by a corporation was for a valuable consideration, and so not within the statute of frauds, may show the value of the business of the agency they gave on condition of such promise.—*McCormick v. Johnson et al.*, 266.

**Appeal—Insufficiency.**

31. The alleged insufficiency of the evidence cannot be considered on appeal where the record does not show that it contains all, or the substance of all, the evidence.—*Merk et al. v. Borey Mining Co.*, 298.

**Telegrams—Agency—Master and Servant—Medical Services.**

32. In an action against a master for medical services rendered a servant who was injured while performing his duties, it appeared that one W. telegraphed to defendant from the place where the injury occurred, asking whether defendant would pay the "doctor's bill." Defendant answered by wire to the sender of the former message. *Held* that, since W. initiated the correspondence, the telegraph company was his agent, and not that of defendant, and hence defendant's reply telegram delivered to the company for transmission was the original, for evidentiary purposes, and not the reply telegram delivered by the telegraph company to W.—*Bond v. Hurd*, 314.

**Telegram Original—Copy—Burden of Proof.**

33. Where plaintiff relied on a telegram the burden was on him to prove the loss of the original, to authorize the admission of a copy.—*Bond v. Hurd*, 314.

**Claim and Delivery—Void Sale.**

34. In an action in claim and delivery for property wrongfully seized under execution defendant could, under a general denial of plaintiff's ownership of the goods seized, show that a sale under which plaintiff claimed was void.—*Gallick v. Bordeaux et al.*, 328.

**Extrinsic Motion in Arrest of Judgment.**

35. Extrinsic evidence cannot be received on a motion in arrest of judgment.—*State v. Tully*, 365.

## Sufficiency—Attorney's Fees.

36. Evidence in support of an administrator's account held sufficient to sustain the allowance to an attorney for the estate of \$12,500 for two and one-half years' services.—*In re Davis' Estate*, 421.

## Lost Wills—Witness—Possession.

37. Evidence that one who was alleged to be a witness to a lost will, but who denied the same, stated at the funeral of testator that he had the will in his pocket, did not tend to prove even remotely that the witness had it in his possession, no one ever having seen it in his possession so far as the testimony disclosed.—*In re Colbert's Estate*, 461.

## Burning Property—Railroads—Locomotives—Sparks.

38. In an action for the burning of property by sparks from a locomotive, a witness may testify how the quantity of sparks thrown by the engine at the time compared with that thrown by other engines along the road.—*Orient Insurance Co. v. Northern Pac. Ry. Co.*, 502.

## Railroads—Warehouses—Liability for Destruction.

39. A railroad company is not relieved of liability for the burning of goods in a warehouse because the owners of the property were stockholders in the warehouse company—a corporation—though in its lease of the ground from the railroad company "it assumed all risk of loss to the building and contents occasioned by fire and sparks from locomotives," etc., and exclusion of evidence tending to show these matters was not error.—*Orient Insurance Co. v. Northern Pac. Ry. Co.*, 502.

## Torts—Conjecture—Jury.

40. Competent evidence must be produced of all facts, necessary to a recovery of damages in actions upon torts, upon which the jury may base a reasonably reliable conclusion, and nothing must be left to mere conjecture.—*Watson et al. v. Colusa-Parrot M. & S. Co.*, 513.

## Pollution of Streams—Complaint—Waiver.

41. By failing to introduce evidence in support of an allegation that damages had been caused by pollution of water so as to render it unfit for a particular use, recovery is waived thereon.—*Watson et al. v. Colusa-Parrot M. & S. Co.*, 513.

## Pollution of Streams—Damages—Non-Expert Witnesses—Opinion Evidence.

42. In an action for damages caused by the pollution of a stream, testimony of non-expert witnesses as to the effect of the water on land and crops is not objectionable as opinion evidence.—*Watson et al. v. Colusa-Parrot M. & S. Co.*, 513.

## Non-Expert Witnesses—Opinion Evidence.

43. When a non-expert witness has shown himself qualified to express an opinion upon the matter in issue, his testimony is not objectionable.—*Watson et al. v. Colusa-Parrot M. & S. Co.*, 513.

## Opinion Evidence—Competency of Witness.

44. Before opinion evidence on the question of value is admissible, the court must pass upon the competency of the witness.—*Watson et al. v. Colusa-Parrot M. & S. Co.*, 513.

## Pollution of Streams—Witnesses—Cross-Examination.

45. In an action for damages caused by the pollution of a stream, a question asked a witness, who produced a sample of water from the stream, as to whether he did not know that the sewerage of a city was dumped into the stream at the place where he procured the sample, should have been allowed on cross-examination.—*Watson et al. v. Colusa-Parrot M. & S. Co.*, 513.

## Written Contract—Contents—Proof.

46. Before evidence of the contents of a written contract can be admitted, the absence of the original agreement must be accounted for.—*Watson et al. v. Colusa-Parrot M. & S. Co.*, 513.

## Corporate Property—Redemption—Agent—Good Faith.

47. Evidence held insufficient to show that one who joined with directors through an agent in redeeming corporate property was a *bona fide* purchaser for value, without notice of the unlawful acts of the directors, and for a valuable consideration paid before he acquired such notice.—*Coombs et al. v. Barker et al.*, 526.

## Appeal—Erroneous Instructions—Transcript.

48. A judgment attacked upon the ground that the instructions were erroneous, will not be disturbed where the transcript does not contain any of the evidence, unless the instructions would have been erroneous under every conceivable state of facts.—*Pryor v. City of Walkerville*, 618.

## New Trial—Jury—Fraud—Undue Influence.

49. In the absence of a statute, and in order to secure freedom of thought, thorough discussion, and independence of action, as well as to prevent undue influence and fraud, the construction or weight given by the jury to evidence submitted to it, is not a subject of inquiry upon a motion for a new trial.—*Spencer v. Spencer*, 631.

## Conflict—Verdict—Findings—Appeal.

50. Where there is a substantial conflict in the evidence, a verdict or finding will not be disturbed on appeal.—*Spencer v. Spencer*, 631.

## Wills—Insanity—Non-Expert Witness—Opinion Evidence.

51. A non-expert witness, who detailed the circumstances relative to the mental condition of the testator for six months prior to the date of the will, upon which he based his conclusion that the decedent was not mentally competent to make a will, may give his opinion as to testator's competency.—*Spencer v. Spencer*, 631.

## Court Records—Best Evidence—Former Action.

52. The court records are the best evidence on the question of the disposition of a former action or proceeding.—*Spencer v. Spencer*, 631.

## EXCEPTIONS.

## To Remarks of Court—Appeal.

1. Where no exception was taken to remarks of the court in ruling on an objection to an argument of counsel, the matter could not be considered on appeal.—*State v. Tully*, 365.

## Refusal of Instruction—Reason Given by Court—Waiver.

2. It is not necessary to take an exception to the reason given by the trial court for refusing an instruction, and by proceeding with the trial after such refusal a party does not waive his exception, but the action of the court is deemed excepted to under Code of Civil Procedure, Section 1080, as amended by Session Laws of 1901, page 160.—*Chessman v. Hale*, 377.

## EXECUTORS.

See, also, ADMINISTRATORS.

## Sales—Probate Courts.

1. Under Revised Statutes 1879, p. 233, Section 209, providing that, when authority is given in a will to sell property, the executor may sell without the order of the probate court, but must make a return of such sales as in other cases, and that no title passes until the sale is confirmed by the court, a private sale by an executrix under a power in the will to manage the estate as she should deem best, and for that purpose to sell any portion or the whole thereof, which is afterwards confirmed by the court, is not a judicial sale, but a sale under the power. —*Goodell v. Sanford et al.*, 163.

## Wills—Power to Sell Real Estate.

2. A will authorizing the executrix to manage the estate as she should deem best, and to sell any portion or the whole thereof, and to invest the proceeds as she should deem fit, empowered the executrix to convey real property to a trustee, who was to hold for a syndicate, which was to plat the same, and under the terms of which sale the purchase price, secured by a lien on the property, was made payable in installments. —*Goodell v. Sanford et al.*, 163.

## Removal—When Proper.

3. Under Code of Civil Procedure, Section 2434, the court properly removed an executor who was palpably deficient in the understanding necessary to enable one to transact business, who made no sufficient effort to collect the debts due the estate, who never read and did not know the contents of affidavits attached to his report, who was ignorant of his personal business relations with the decedent whose estate he was administering, and who, in short, was incompetent because incapable.—*In re Courtney's Estate*, 625.

## Accounts—Referees—Reports—Advisory Only.

4. The report and findings of a referee, appointed for the purpose of examining the account of an executor, hearing the objections thereto and making report thereon, are merely advisory to the court, and may be adopted, modified or disapproved, as the court sees fit; and the court may, if it so desires, take further testimony, and make findings of its own on which to base its orders. — *In re Courtney's Estate*, 625.

## Executors—Compensation—Settlement of Accounts—Presumptions.

5. On appeal from an order settling the semi-annual account of an executor and from an order revoking his letters, it will be presumed, in the absence of anything in the orders on the subject, that upon a final settlement of the estate the proper compensation will be allowed to the executor for his services.— *In re Courtney's Estate*, 625.

**Distribution—Acquiescence—Estoppel.**

6. An heir who has acquiesced in the settlement and final distribution of an estate, is estopped to call such settlement and distribution in question, or to compel the return of, or an accounting for, the property thus parted with by the executor or administrator in good faith.—*Spencer v. Spencer*, 631.

**FENCES.****Railroads—Stations—Statutes.**

1. The statute does not require a railroad to fence at a station.—*Beaudin v. Oregon Short Line R. R. Co.*, 238.

**FINDINGS.****Immaterial—Effect on Those Material.**

1. The fact that some of the findings of the court are immaterial does not impair the effect of such as are material.—*Hays v. Buzard et al.*, 74.

**Equity Cases—Review—Water Rights—Evidence.**

2. Under Laws of Second Extraordinary Session 1903, p. 7, authorizing the supreme court to review all questions of fact and of law in equity cases, in a suit to determine water rights, the findings will not be disturbed because of the erroneous admission of evidence, where the remainder of the evidence preponderates in favor of the findings.—*Hays v. Buzard et al.*, 74.

**Right of Litigant Request.**

3. A party litigant is entitled to a specific finding on each material issue, but he cannot be heard to complain where no finding is made unless he has complied with the statute in requesting the same.—*Quinlan v. Calvert*, 115.

**Written—Submission—Effect.**

4. Where the court stated that it would make findings of fact, defendant was relieved from making any request for findings, and the submission of written findings had the effect of requesting findings in writing on the material facts involved.—*Quinlan v. Calvert*, 115.

**When Not Implied.**

5. Where affirmative matter is set up in the answer, no finding can be implied as to such independent issue, where a specific finding was requested thereon.—*Quinlan v. Calvert*, 115.

**When Insufficient.**

6. Where affirmative matter is set out in the answer, and a request made for a finding thereon, a finding that all the material allegations of the complaint are true, and directing that judgment be entered for plaintiff, is insufficient.—*Quinlan v. Calvert*, 115.

**Appeal from Judgment—Evidence.**

7. On appeal from the judgment only, the record may be examined to determine whether there is any evidence to support the finding.—*Sheldon v. Powell*, 249.

## Motion to Reject—Order—Not Appealable.

8. An order overruling a motion to reject findings made by the jury is not appealable, not being among the orders enumerated in Code of Civil Procedure, Section 1722, as amended by Session Laws 1899, p. 146, from which appeals are allowed.—*Johns v. Barnes*, 426.

## Issues—Harmless Error.

9. The submission of issues not raised by the pleadings is harmless, when the findings thereon, in view of the authorized findings, are immaterial, so far as the ultimate rights of the parties are concerned.—*Spencer v. Spencer*, 631.

## Evidence—Conflict—Verdict—Appeal.

10. Where there is a substantial conflict in the evidence, a verdict or finding will not be disturbed on appeal.—*Spencer v. Spencer*, 631.

## FORFEITURES.

## Action to Remove Cloud.

1. An action seeking to remove as a cloud on plaintiffs' title defendant's claim under a contract giving them an option to purchase, which plaintiffs had declared forfeited before commencement of the action, is not an action to declare a forfeiture.—*Merk et al. v. Bowery Mining Co.*, 298.

## Option to Purchase—Mines—Return of Installment of Price.

2. Where plaintiffs gave an option to purchase their mining property by the payment of the price in installments at certain dates, time being of the essence, they were not required, on declaring a forfeiture for failure to pay the price as required, to return an installment paid.—*Merk et al. v. Bowery Mining Co.*, 298.

## FRAUD.

See, also, NEGOTIABLE INSTRUMENTS, 1.  
ACCOUNT STATED, 2.

## Parol Evidence—Varying Written Contract.

1. Plaintiff alleged mistake and fraud, and the evidence disclosed that the inducement held out to plaintiff to sign an agreement was based on fraudulent representations of defendants that a lease need not be mentioned in a contract of sale of a business and the lease. *Held*, that evidence was admissible showing the purchase of the lease and defendants' fraudulent conduct, over objection that it varied the contract.—*Sathre v. Rolfe et al.*, 85.

## Notes—Assignment—Fraud—Defenses.

2. Where defendant assigned notes given as consideration on the sale of a business, which he induced by fraud, to a third person as security for a pre-existing debt, such third person was not a *bona fide* holder, and the notes were subject to all the defenses which might have been urged against them in the hands of defendant.—*Sathre v. Rolfe et al.*, 85.

## Conveyances—From Daughter to Mother.

3. The mere fact that a conveyance of land is from a daughter to her mother, or *vice versa*, is not sufficient to stamp it with fraud.—*Mueller v. Renkes*, 100.

## Conveyances—Land—Consideration—Nominal.

4. Where the owner of land conveyed the same to one to whom the owner was indebted for advances, the real consideration being \$2,100, and between \$800 and \$1,200 having been paid on the execution of the deed, the balance being covered by the advances, though the nominal consideration in the deed was only \$1, such conveyance was not fraudulent as to creditors.—*Mueller v. Renkes*, 100.

## Real Estate—Sale—Rescission—Pleadings—Sufficiency.

5. In an action to rescind a sale of real estate for fraud, an allegation that plaintiff relied on the representations made constituted a sufficient averment that he believed them to be true.—*Spencer v. Hersam et al.*, 120.

## Corporations—Directors—Breach of Duty—Fraud in Law.

6. A breach of official duty on the part of the directors of a corporation is fraud in law, and sufficient to warrant relief if proven, though no fraud in fact is alleged.—*Coombs et al. v. Barker et al.*, 526.

## Corporations—Redemption of Corporate Property—Directors—Third Persons.

7. One who was present at the time the redemption of property was agreed upon between directors of the corporation which owned the property, and who took part in the redemption, was charged with knowledge that the transaction was constructively fraudulent as against the corporation and its stockholders, and stood in no better position than the directors involved.—*Coombs et al. v. Barker et al.*, 526.

## Corporate Notes—Directors—Action—Banks—Necessary Parties.

8. Corporate notes executed by the directors to a bank cannot be set aside for fraud or any other reason, in an action by stockholders against the directors to which the bank has not been made a party.—*McConnell et al. v. Combination M. & M. Co.* (on rehearing), 563.

## GUARDIANS.

## Accounts—Settlement—Appeal.

1. An order confirming a guardian's account, being appealable under Session Laws of 1899, page 146, and no appeal having been taken therefrom, questions respecting its settlement cannot be considered on a subsequent appeal from an order of sale of the ward's real estate.—*In re Scheuer's Estate*, 606.

## Probate Courts—Jurisdiction—Real Property—Sale—Insane Ward—Restoration to Capacity.

2. The district court, sitting as a court of probate, has no jurisdiction to entertain or grant an order for the sale of real property belonging to one who has been under guardianship because of mental incapacity, after such person has been judicially restored to capacity.—*In re Scheuer's Estate*, 606.

## Authority Over Estate of Ward—Statutory Construction.

3. The authority of a guardian of an incompetent over the person or estate of the ward is not extended by Code of Civil Procedure, Section 2972, to the time when he is "legally discharged" by an order of court, but such guardianship is, under Section 2973 of the same Code, terminated, *ipso facto*, by the judicial determination that the ward is of sound mind, and the adjudication of his restoration to capacity.—*In re Scheuer's Estate*, 606.

## INSANITY.

## GRAND JURY.

See JURY, 3, 4.

## HABEAS CORPUS.

## Supplementary Proceedings- Contempt.

1. Where in supplementary proceedings the court erroneously ordered that defendant satisfy plaintiff's judgment out of the proceeds of an order on a certain society payable to defendant, instead of appointing a receiver to collect the order and make the application, and defendant was committed for contempt for failing to comply with the order, the court having had jurisdiction of the supplementary proceedings and of the person of defendant, defendant could not obtain release from custody on *habeas corpus*, irrespective of any question as to the appealability of the order.—*In re Dorney*, 441.

## HARMLESS ERROR.

## Cross-Examination.

1. Any error in allowing plaintiff on cross-examination to be asked how a certain account stood is harmless, he having answered that he did not know.—*McCormick v. Johnson et al.*, 266.

## Instructions - Clerical Error.

2. The giving of instructions, in an action for damages for personal injuries resulting from a defective sidewalk, which misnamed the street where the accident was alleged to have occurred, will not justify the reversal of a judgment in favor of plaintiff, where it appears that the rights of appellant were not prejudiced by such obvious mistake or clerical error.—*Pryor v. City of Walkerville*, 618.

## Findings - Issues.

3. The submission of issues not raised by the pleadings is harmless, when the findings thereon, in view of the authorized findings, are immaterial, so far as the ultimate rights of the parties are concerned.—*Spencer v. Spencer*, 631.

## INFORMATION.

See CRIMINAL LAW, 2, 5, 6, 10.

## INSANE WARDS.

See GUARDIANS, 2, 3.

## INSANITY.

## Wills - Non-Expert Witness - Opinion - Evidence.

1. A non-expert witness, who detailed the circumstances relative to the mental condition of the testator for six months prior to the date of the will, upon which he based his conclusion that the decedent was not mentally competent to make a will, may give his opinion as to testator's competency.—*Spencer v. Spencer*, 631.



## INSTRUCTIONS.

See. also, RECORD, 1.

## Conversion—Chattel Mortgages.

1. In conversion by a mortgagor of a chattel against a purchaser from the mortgagee who was rightfully in possession, a charge to find for plaintiff if he was the owner of the property and defendant had knowledge of his rights, was erroneous, as ignoring the question of plaintiff's right to possession.—*Potter v. Lohse*, 91.

## Conflicting—New Trial—Abuse of Discretion.

2. Where instructions warranted a finding for defendant, but were inconsistent and conflicting with other instructions, the court abused its discretion in granting a new trial on the ground that the verdict was against the law because contrary to the instructions, since the verdict, while opposed to some of the instructions, was warranted by others.—*Cotter v. Butte & Ruby Valley Smelting Co.*, 129.

## Jury—Must Obey—New Trial.

3. The jury is bound by the law as given by the court, whether correct or not, and, if they do not follow such instructions in rendering their verdict, the verdict will be set aside and a new trial granted.—*Cotter v. Butte & Ruby Valley Smelting Co.*, 129.

## Refusal—When Not Error.

4. Where the instructions given incorporate the substance of those requested, it is not error to refuse to adopt them.—*Parton v. Woodward*, 195.

## When Not Objectable.

5. An instruction setting forth a clear and concise statement of the nature of the case and the issues to be determined is not objectionable.—*Parton v. Woodward*, 195.

## Libel—Constitution—Jury.

6. While the Constitution, Article III, Section 10, provides, among other things, that in all suits and prosecutions for libel the jury shall determine the law as well as the facts, under the direction of the court, yet, it being the duty of the court to give the jury a correct declaration of the legal principles involved, an erroneous instruction to the prejudice of plaintiff is cause for reversal.—*Parton v. Woodward*, 195.

## Assumption of Facts.

7. It is error for the court in its charge to assume as proven a fact which is in issue.—*Gallick v. Bordeaux et al.*, 328.

## Claim and Delivery—Constables—Legal Questions.

8. In an action against a constable for the wrongful seizure of property under execution the questions whether the justice had jurisdiction of the parties and of the subject-matter, whether the judgment was wrongfully made, and whether the execution was in due form, were questions of law, and instructions that those things must appear in order to make out the defense of justification under the writ were erroneous in submitting legal questions to the jury.—*Gallick v. Bordeaux et al.*, 328.

**Claim and Delivery—Erroneous.**

9. In an action in claim and delivery plaintiff must recover upon the strength of his own title, and not upon the weakness of defendant's title, and an instruction authorizing a verdict for plaintiff if there were some particular defects in the justification relied upon by defendant is erroneous.—*Gallick v. Bordeaux et al.*, 328.

**When Refusal Proper.**

10. Instructions covering a feature of the case properly covered by other instructions given may be refused.—*Gallick v. Bordeaux et al.*, 328.

**Claim and Delivery—Modification—Error.**

11. In an action in claim and delivery for property wrongfully seized under execution, an instruction authorizing a verdict for defendant unless the sale under which plaintiff claimed was followed by "an actual and continued change of possession" was improperly modified by striking out the words "and continued."—*Gallick v. Bordeaux et al.*, 328.

**Disregard by Jury—Effect on Appeal.**

12. Where the evidence in the record clearly shows that the jury disregarded the instructions of the trial court, the verdict will be set aside, without determining the propriety of the instructions.—*McAllister v. Rocky Fork Coal Co.*, 359.

**Refusal—Reason Given by Court—Exceptions—Waiver.**

13. It is not necessary to take an exception to the reason given by the trial court for refusing an instruction, and by proceeding with the trial after such refusal a party does not waive his exception, but the action of the court is deemed excepted to under Code of Civil Procedure, Section 1080, as amended by Session Laws of 1901, page 160.—*Cheesman v. Hale*, 577.

**Erroneous—Judgments—Transcript—Evidence—Appeal.**

14. A judgment attacked upon the ground that the instructions were erroneous, will not be disturbed, where the transcript does not contain any of the evidence, unless the instructions would have been erroneous under every conceivable state of facts.—*Pryor v. City of Walkerville*, 618.

**Personal Injuries—Sidewalks—Harmless Error.**

15. The giving of instructions, in an action for damages for personal injuries resulting from a defective sidewalk, which misnamed the street where the accident was alleged to have occurred, will not justify the reversal of a judgment in favor of plaintiff, where it appears that the rights of appellant were not prejudiced by such obvious mistake or clerical error.—*Pryor v. City of Walkerville*, 618.

**How to be Construed.**

16. Instructions must be construed as a whole in their relations to the pleadings and testimony.—*Pryor v. City of Walkerville*, 618.

**Judgment Roll—Appeal.**

17. Unless instructions given, and those requested and refused, are made part of the judgment roll, they will not be considered on appeal.—*Spencer v. Spencer*, 631.

## JUDGMENTS.

**Appeal—Evidence to Support Judgment.**

1. Where an appeal is from the judgment, and not from the order overruling the motion for new trial, the court will not determine the sufficiency of the evidence, but only determine whether there is any evidence to support the judgment.—*Daves v. City of Great Falls*, 9.

**Consolidation of Actions—Effect.**

2. Under Code of Civil Procedure, Section 1894, actions consolidated are merged into one suit, and hence only a single judgment should be rendered settling the entire controversy.—*Handley v. Sprinkle*, 57.

**By Default—Justice Court.**

3. Where defendant appears in a justice court, and files an answer, and the trial is then adjourned to a day certain, a judgment by default cannot be entered on such trial, though defendant does not then appear and take part in the trial.—*State ex rel. Grissom v. Justice Court et al.*, 258.

**Verdict—Costs—Damages.**

4. Where a verdict as directed by the court and returned was for the defendant for costs, the court had no power to render judgment in favor of defendant for costs, and for damages claimed in an untried counterclaim.—*Duane v. Molinak*, 343.

**Probate Proceedings—"Orders or Judgments."**

5. The term "final judgment" as used in Code of Civil Procedure, Section 1722, Subdivision 2, refers only to those judgments known at common law as final judgments, and has no application to the statutory determinations and orders termed "orders or judgments" in probate proceedings.—*In re Kelly's Estate* (on motion for rehearing), 356.

**Motion in Arrest—Upon What Founded.**

6. A motion in arrest of judgment must be founded on some defect in the information mentioned in Section 1922, Penal Code.—*State v. Tully*, 365.

**Extrinsic Evidence—Motion in Arrest of Judgment.**

7. Extrinsic evidence cannot be received at a hearing on a motion in arrest of judgment.—*State v. Tully*, 365.

**For President Against Corporation—Proper Charge—When.**

8. A judgment obtained by the president of a corporation against the corporation for money expended by him for it, is a charge against it, to be satisfied out of the assets of the company, after such officer has accounted for funds misappropriated by him as president.—*McConnell et al. v. Combination M. & M. Co.* (on rehearing), 563.

**Erroneous Instructions—Transcript—Evidence—Appeal.**

9. A judgment attacked upon the ground that the instructions were erroneous, will not be disturbed, where the transcript does not contain any of the evidence, unless the instructions would have been erroneous under every conceivable state of facts.—*Prior v. City of Walkerville*, 618.

## Claim and Delivery—Erroneous.

9. In an action in claim and delivery plaintiff must recover upon the strength of his own title, and not upon the weakness of defendant's title, and an instruction authorizing a verdict for plaintiff if there were some particular defects in the justification relied upon by defendant is erroneous.—*Gallick v. Bordeaux et al.*, 328.

## When Refusal Proper.

10. Instructions covering a feature of the case properly covered by other instructions given may be refused.—*Gallick v. Bordeaux et al.*, 328.

## Claim and Delivery—Modification—Error.

11. In an action in claim and delivery for property wrongfully seized under execution, an instruction authorizing a verdict for defendant unless the sale under which plaintiff claimed was followed by "an actual and continued change of possession" was improperly modified by striking out the words "and continued."—*Gallick v. Bordeaux et al.*, 328.

## Disregard by Jury—Effect on Appeal.

12. Where the evidence in the record clearly shows that the jury disregarded the instructions of the trial court, the verdict will be set aside, without determining the propriety of the instructions.—*McAllister v. Rocky Fork Coal Co.*, 359.

## Refusal—Reason Given by Court—Exceptions—Waiver.

13. It is not necessary to take an exception to the reason given by the trial court for refusing an instruction, and by proceeding with the trial after such refusal a party does not waive his exception, but the action of the court is deemed excepted to under Code of Civil Procedure, Section 1080, as amended by Session Laws of 1901, page 180.—*Chessman v. Hale*, 577.

## Erroneous—Judgments—Transcript—Evidence—Appeal.

14. A judgment attacked upon the ground that the instructions were erroneous, will not be disturbed, where the transcript does not contain any of the evidence, unless the instructions would have been erroneous under every conceivable state of facts.—*Pryor v. City of Walkerville*, 618.

## Personal Injuries—Sidewalks—Harmless Error.

15. The giving of instructions, in an action for damages for personal injuries resulting from a defective sidewalk, which misnamed the street where the accident was alleged to have occurred, will not justify the reversal of a judgment in favor of plaintiff, where it appears that the rights of appellant were not prejudiced by such obvious mistake or clerical error.—*Pryor v. City of Walkerville*, 618.

## How to be Construed.

16. Instructions must be construed as a whole in their relations to the pleadings and testimony.—*Pryor v. City of Walkerville*, 618.

## Judgment Roll—Appeal.

17. Unless instructions given, and those requested and refused, are made part of the judgment roll, they will not be considered on appeal.—*Spencer v. Spencer*, 631.

## JUDGMENTS.

**Appeal—Evidence to Support Judgment.**

1. Where an appeal is from the judgment, and not from the order overruling the motion for new trial, the court will not determine the sufficiency of the evidence, but only determine whether there is any evidence to support the judgment.—*Dawes v. City of Great Falls*, 9.

**Consolidation of Actions—Effect.**

2. Under Code of Civil Procedure, Section 1894, actions consolidated are merged into one suit, and hence only a single judgment should be rendered settling the entire controversy.—*Handley v. Sprinkle*, 57.

**By Default—Justice Court.**

3. Where defendant appears in a justice court, and files an answer, and the trial is then adjourned to a day certain, a judgment by default cannot be entered on such trial, though defendant does not then appear and take part in the trial.—*State ex rel. Grissom v. Justice Court et al.*, 258.

**Verdict—Costs—Damages.**

4. Where a verdict as directed by the court and returned was for the defendant for costs, the court had no power to render judgment in favor of defendant for costs, and for damages claimed in an untried counterclaim.—*Duane v. Molinak*, 343.

**Probate Proceedings—"Orders or Judgments."**

5. The term "final judgment" as used in Code of Civil Procedure, Section 1722, Subdivision 2, refers only to those judgments known at common law as final judgments, and has no application to the statutory determinations and orders termed "orders or judgments" in probate proceedings.—*In re Kelly's Estate* (on motion for rehearing), 356.

**Motion in Arrest—Upon What Founded.**

6. A motion in arrest of judgment must be founded on some defect in the information mentioned in Section 1922, Penal Code.—*State v. Tully*, 365.

**Extrinsic Evidence—Motion in Arrest of Judgment.**

7. Extrinsic evidence cannot be received at a hearing on a motion in arrest of judgment.—*State v. Tully*, 365.

**For President Against Corporation—Proper Charge—When.**

8. A judgment obtained by the president of a corporation against the corporation for money expended by him for it, is a charge against it, to be satisfied out of the assets of the company, after such officer has accounted for funds misappropriated by him as president.—*McConnell et al. v. Combination M. & M. Co.* (on rehearing), 563.

**Erroneous Instructions—Transcript—Evidence—Appeal.**

9. A judgment attacked upon the ground that the instructions were erroneous, will not be disturbed, where the transcript does not contain any of the evidence, unless the instructions would have been erroneous under every conceivable state of facts.—*Pryor v. City of Walkerville*, 618.

## JUDICIAL NOTICE.

## Location of Buildings—Numbering Houses in Cities.

1. The court cannot take judicial notice of the system employed by cities in numbering houses, nor of the relative location of buildings, nor whether there are buildings on certain lots and blocks.—*State v. Rogers*, 1.

## Military Reservations.

2. Judicial notice may be taken of the fact that the Fort Missoula military reservation is situated in Missoula county.—*State v. Tully*, 365.

## Federal Government—Executive Orders—Military Reservations.

3. Under Section 3150, Code of Civil Procedure, the courts take judicial notice of executive orders of the federal government creating the Fort Missoula military reservation.—*State v. Tully*, 365.

## JUDICIAL SALES.

See SALES, 1. 6.

## JURISDICTION.

See, also, DISTRICT COURTS and PROBATE COURTS.

## District Court—Appeals from Justice Courts.

1. Under Code of Civil Procedure, Section 1761, providing that all appeals from the justice's court must be tried anew in the district court, that court sits as a justice of the peace in that case, and with no greater jurisdiction, and either party may have reviewed any question of law or fact which was raised before the justice and presented to the district court.—*State ex rel. Grissom v. Justice Court et al.*, 250.

## Justice Courts Summons—Complaint—Copy.

2. The service of a justice's summons without a copy of the complaint gives no jurisdiction of defendant.—*State ex rel. Reagan v. Harrington*, 294.

## Homicide—Military Reservations.

3. *Held*, that neither title to, nor sovereignty over, that part of section 36, township 13, N. R. 20 W., upon which some of the buildings of Fort Missoula were erected, ever passed to the state of Montana under Act of Congress of February 22, 1889, granting land to the proposed state of Montana, and hence that the state court had no jurisdiction over a homicide committed on such part of said section 36.—*State v. Tully*, 365.

## Probate Courts—Limited.

4. District courts, sitting as courts of probate, are courts of special and limited jurisdiction, possessing no powers other than those expressly or by necessary implication conferred by statute.—*In re Scheuer's Estate*, 606.

## JURY.

## Must Obey Instructions.

1. The jury is bound by the law as given by the court, whether correct or not, and, if they do not follow such instructions in rendering their verdict,

the verdict will be set aside and a new trial granted.—*Cotter v. Butte & Ruby Valley Smelting Co.*, 129.

#### Disregard of Instructions—Effect—Appeal.

2. Where the evidence in the record clearly shows that the jury disregarded the instructions of the trial court, the verdict will be set aside, without determining the propriety of the instructions.—*McAllister v. Rocky Fork Coal Co.*, 359.

#### Making List—Regularity—Who May Question.

3. A member of a jury commission, who, by his own misconduct in office as a member of such commission, has rendered the making of the jury list so irregular that as to others it might be invalid, cannot take advantage of his own wrongdoing when called on to answer a criminal charge presented by a grand jury selected from such jury list.—*State ex rel. Clark v. District Court et al.*, 428.

#### Grand Jury—Time of Service.

4. Under Code of Civil Procedure, Section 245, providing that "the persons whose names are so returned are known as regular jurors and will serve for one year and until other persons are selected and returned," a grand jury organized in December, 1903, from the jury list of that year, and not discharged by the court, may return a valid indictment though the jury list for 1904 may have been made and filed before the date of the indictment.—*State ex rel. Clark v. District Court et al.*, 428.

#### Torts—Evidence—Conjecture.

5. Competent evidence must be produced of all facts, necessary to a recovery of damages in actions upon torts, upon which the jury may base a reasonably reliable conclusion, and nothing must be left to mere conjecture.—*Watson et al. v. Colusa-Parrot M. & S. Co.*, 513.

#### Nuisances—Action for Damages—Right of Jury Trial—Equitable Relief.

6. Under the Constitution of the United States, Seventh Amendment, in force at the time of the adoption of the Constitution of Montana, and under Article III, Section 23, of the Constitution of Montana, and Code of Civil Procedure, Section 1300, and Civil Code, Sections 4550, 4555 and 4590, plaintiff in an action for damages for the maintenance of a nuisance is entitled to a trial by jury of his right to damages, although he also asks for the equitable relief of injunction to restrain the continuance of the acts complained of.—*Chessman v. Hale*, 577.

#### Nuisances—Action for Damages—Jury Trial—How Waived.

7. Under Constitution, Article III, Sections 23 and 29, and Code of Civil Procedure, Section 1110, prescribing the manner in which a jury in a civil case may be waived, plaintiff's right to a jury trial in an action for damages for a nuisance could only be waived in one of the modes specified, and was not waived by his failure to demand a trial by jury, or to submit to the court the question as to whether he had a right to a jury trial, or by endeavoring to maintain his claim under the theory of the case which the court, by its ruling that it was an action in equity, compelled him to adopt.—*Chessman v. Hale*, 577.

#### Findings—Dissenting Jurors—Affidavits.

8. Special findings acquiesced in by the required two-thirds of a jury may not be set aside by reason of affidavits made by dissenting jurors that, in

their opinion, the conclusion of the majority was reached by giving a wrong construction or too much weight to a part of the evidence.—*Spencer v. Spencer*, 631.

**New Trial—Fraud—Undue Influence—Evidence.**

9. In the absence of a statute, and in order to secure freedom of thought, thorough discussion, and independence of action, as well as to prevent undue influence and fraud, the construction or weight given by the jury to evidence submitted to it, is not a subject of inquiry upon a motion for a new trial.—*Spencer v. Spencer*, 631.

**JUSTICES OF THE PEACE.**

***Certiorari*—Appeal—Notice—Jurisdiction.**

1. So far as *certiorari* proceedings are concerned there is no distinction between the justice of the peace court of a township presided over by S., justice of the peace, and S., justice of the peace of the township, so that notice of appeal in the name of the justice is sufficient to give jurisdiction; the authority of the "justice of the peace" and the "justice of the peace court" being identical.—*State ex rel. Grissom v. Justice Court et al.*, 258.

***Certiorari*—When It Will Lie.**

2. Under Code of Civil Procedure, Section 1941, to entitle one to a writ of review from the district court it must appear that the inferior tribunal was performing some judicial act, that such tribunal exceeded its jurisdiction, and that there is no appeal or other speedy and adequate remedy.—*State ex rel. Grissom v. Justice Court et al.*, 258.

**Appearance—Answer—Judgment by Default.**

3. Where defendant appears in a justice court, and files an answer, and the trial is then adjourned to a day certain, a judgment by default cannot be entered on such trial, though defendant does not then appear and take part in the trial.—*State ex rel. Grissom v. Justice Court et al.*, 258.

**Appeal—District Courts—Jurisdiction.**

4. Under Code of Civil Procedure, Section 1761, providing that all appeals from the justice's court must be tried anew in the district court, that court sits as a justice of the peace in that case, and with no greater jurisdiction, and either party may have reviewed any question of law or fact which was raised before the justice and presented to the district court.—*State ex rel. Grissom v. Justice Court et al.*, 258.

**Appearance—Parties Charged with Notice—Appeal.**

5. Where defendants appear in an action before a justice, file their separate answers, and by stipulation agree to a particular time for trial, they are chargeable with actual notice of all subsequent proceedings, and, though they do not appear at said time, their remedy is by appeal, which excludes a remedy by writ of *certiorari*.—*State ex rel. Grissom v. Justice Court et al.*, 258.

**Service of Summons—Non-Official Persons.**

6. Code of Civil Procedure, Section 1688, as amended by Session Laws 1899, page 138, providing for the appointment of a special constable where no constable is elected or appointed to act in certain cases, did not affect Section 1510, authorizing a non-official person to serve a justice's summons.—*State ex rel. Reagan v. Harrington*, 294.



## Summons—Complaint—Copy—Jurisdiction.

7. The service of a justice's summons without a copy of the complaint gives no jurisdiction of defendant.—*State ex rel. Reagan v. Harrington*, 294.

## Summons—Return—Presumptions.

8. The return on a justice's summons is presumed to show all that was done by the person making the service.—*State ex rel. Reagan v. Harrington*, 294.

## Appeal—District Courts—Pleadings.

9. The pleadings in the district court on an appeal from a justice or police court are governed by the same rules as pertain to pleadings in such courts.—*Duane v. Molinak*, 343.

## LANDS.

See, also, PUBLIC LANDS.

## Injury to—Pollution of Streams—Pleadings—Proof.

1. In order to permit a recovery for injury to crops and for permanent injury to the land on which the crops were raised, it should be distinctly and unequivocally alleged and proven on what date the permanent injury to the land took place, how much of the land was permanently injured, and the annual injury to crops prior to that date.—*Watson et al. v. Colusa-Parrot M. & S. Co.*, 513.

## Injury to—Pollution of Streams—When Suit May be Brought.

2. In order to recover damages, resulting from a nuisance, for total and permanent injury to land, caused by pollution of a stream, such injury must have been completed before suit can be brought.—*Watson et al. v. Colusa-Parrot M. & S. Co.*, 513.

## Pollution of Streams—Damages Recoverable—By Whom.

3. Owners of agricultural lands cannot recover for injuries arising from a destruction of crops, by reason of pollution of the waters of a stream, prior to the date when they acquired title to the lands, unless they were then in possession or entitled to possession thereof.—*Watson et al. v. Colusa-Parrot M. & S. Co.*, 513.

## Pollution of Streams—Effect—Non-Expert Witnesses—Opinion Evidence.

4. In an action for damages caused by the pollution of a stream, testimony of non-expert witnesses as to the effect of the water on land and crops is not objectionable as opinion evidence.—*Watson et al. v. Colusa-Parrot M. & S. Co.*, 513.

## Placer Mining—Pollution of Streams—Injury to Land.

5. Under Civil Code, Sections 1880 and 4605, an appropriator of an upper water right who, in a contract to deliver it to a lower owner of land at a certain place, has reserved to himself the right to use the water for placer mining purposes, acquires no title to the water itself, or any right to pollute the water to any greater extent than is permitted by law; and, while he has a right to a reasonable use of the water for the purposes specified, although such use does result in fouling it to some extent, yet he cannot cover the lower proprietor's land with mining debris, so as to render it valueless.—*Chessman v. Hale*, 577.

## LANDLORD AND TENANT.

See, also, WARRANTY, 1, 2.  
LEASES.

## Lease—Leaving Key to Building with Lessor Over Protest—Not Acceptance.

1. Leaving the key to a leased building at the lessor's place of business over his protest, and in spite of his refusal to accept a surrender of the premises demised, is not such an acceptance by the lessor as will relieve the lessee from the payment of rent.—*Landt et al. v. Schneider*, 15.

## Obligation of Landlord to Repair Does Not Apply to Business Property.

2. Civil Code, Sections 2620, 2621, providing that, where a leased building is intended for the occupation of human beings, the lessor must, in the absence of agreement to the contrary, put the same in a condition fit for habitation, and repair subsequent dilapidations, etc., does not apply to business property, but is limited in its application to property used for dwelling-house purposes.—*Landt et al. v. Schneider*, 15.

## Action for Rent—Evidence.

3. A letter written subsequent to the beginning of an action for rent, which did not by its terms ratify any previous act of one of the lessors, was inadmissible for the purpose of showing authority on his part to make a previous agreement with the lessee on behalf of the other lessors.—*Landt et al. v. Schneider*, 15.

## LEASES.

See, also, LANDLORD AND TENANT.  
FRAUD, 1.  
EVIDENCE, 11, 12.

## Abandonment—Leaving Key with Lessor Over Protest—Effect.

1. Leaving the key to a leased building at the lessor's place of business over his protest, and in spite of his refusal to accept a surrender of the premises demised, is not such an acceptance by the lessor as will relieve the lessee from the payment of rent.—*Landt et al. v. Schneider*, 15.

## Warranty That Premises Are Suitable for Certain Purposes.

2. In the absence of statute or agreement, there is no implied warranty that leased premises are suitable for the purpose for which they are demised.—*Landt et al. v. Schneider*, 15.

## Warranty to Keep Premises in Repair.

3. In the absence of statute or agreement, there is no implied warranty that the lessor will keep the leased property in repair.—*Landt et al. v. Schneider*, 15.

## Lessor—Obligation to Repair—Business Property.

4. Civil Code, Sections 2620, 2621, providing that, where a leased building is intended for the occupation of human beings, the lessor must, in the absence of agreement to the contrary, put the same in a condition fit for habitation, and repair subsequent dilapidations, etc., does not apply to business property, but is limited in its application to property used for dwelling-house purposes.—*Landt et al. v. Schneider*, 15.

**Purpose for Which Premises Leased—Parol Evidence.**

5. Where there was nothing contained in the description of property in a lease by which it could be determined from the lease itself whether it was intended for occupation by human beings or not, which was one of the issues made by the pleadings, parol evidence was admissible to explain the purpose for which the property was leased, together with its condition and description.—*Landt et al. v. Schneider*, 15.

**Extension—Statute of Frauds.**

6. Where one of several lessors of a building had no written authority to sign an extension agreement containing an agreement for a conveyance of the land, for one of the other lessors, as required by Civil Code, Section 2185, Subdivision 5, such extension agreement, which was for more than a year, was invalid.—*Landt et al. v. Schneider*, 15.

**Sale of Leasehold Interest—Statute of Frauds.**

7. Where plaintiff purchased a leasehold interest, paid the consideration, and went into possession of the premises with defendants' consent, and the promise to obtain the transfer of the lease was the inducement to sign a contract, omitting mention of the lease, on the sale of a business, defendants, without placing plaintiff in *statu quo*, could not assert that the promise to procure the lease was void under the statute of frauds.—*Sathre v. Rolfe et al.*, 85.

**Option to Purchase—Removing Cloud on Title.**

8. Where plaintiffs gave a lessee an option to purchase, and the lessee gave defendant an option to purchase from him, pursuant to which defendant made a payment to the lessee, who turned it over to plaintiffs, they were not required to return it to defendant in order to maintain a suit against defendant to remove its claim as a cloud on the title.—*Merk et al. v. Bowery Mining Co.*, 298.

**Extension—Mines—Option to Purchase.**

9. Where a lease of mining property for royalties gave the lessee an option to purchase by paying in installments, and the time for payment of some installments was extended by an agreement which provided that the extension applied only to the payments for purchase, and did not affect the original contract in any other respect, the lease was not extended.—*Merk et al. v. Bowery Mining Co.*, 298.

**Extension—Modification of Original Contract.**

10. A contract leasing and giving an option to purchase mining property provided for the payment of royalties and of the price in installments if the option should be exercised, and declared that, if the lessee should not perform all the conditions, the agreement should be "void *ab initio*." An extension of time for the payment of installments was given, the supplemental agreement granting it providing that, if the lessee should fail to comply with the contract as modified, such failure should cause a forfeiture. Held, that this modified the provision of the original contract that failure to perform should render it void *ab initio*.—*Merk et al. v. Bowery Mining Co.*, 298.

## LIBEL.

**Per Se—"Common Law."**

1. To publish by a written unprivileged charge of an individual falsely that he is a common liar is libelous *per se*.—*Paxon v. Woodward*, 195.

## Construction of Language Used.

2. In arriving at the sense in which alleged libelous language is employed it is proper to consider the cause and circumstances of its publication and the entire language used.—*Paxton v. Woodward*, 195.

## Justification—Pleadings.

3. Where an imputation complained of is a conclusion from certain facts, a plea of justification averring the existence of a state of facts which warrants the inference of the charge is sufficient.—*Paxton v. Woodward*, 195.

*Per Se*—General Damages—Pleadings—Proof.

4. When the publication is libelous *per se*, the plaintiff may recover general damages without allegations or proof of special damages.—*Paxton v. Woodward*, 195.

## Pleadings—Meaning Intended.

5. Under Section 751, Code of Civil Procedure, when the words are unequivocal in their import and obviously defamatory, it is not necessary to employ colloquium or innuendo to explain their application and meaning; but if the words be of doubtful significance, or derive their libelous character not from their own intrinsic force, but from extraneous facts, it is necessary to allege the meaning intended, or set forth such extraneous facts by proper averments.—*Paxton v. Woodward*, 195.

School Teachers—Words Not Libelous *Per Se*.

6. To say of a school teacher that he is "noted," though used in an inviolent sense, and, referring to a particular district, "has done more damage and less good than any other teacher," and, referring to his application for a position as teacher of its school, "this district knows when it has had enough, so it turned the gentleman down," cannot be said to impeach him in any of those qualities which are essentials of an accomplished school teacher, and is not libelous *per se*.—*Paxton v. Woodward*, 195.

## Malice—Pleadings.

7. In an action for libel, the existence of malice is not a necessary ingredient to entitle plaintiff to recover.—*Paxton v. Woodward*, 195.

## Malice—Materiality—Privileged Publication.

8. In an action for libel malice becomes material only as a circumstance affording a basis for increasing or diminishing the amount of recovery and in cases involving the defense of privileged publication.—*Paxton v. Woodward*, 195.

## Malice—Exemplary and Compensatory Damages.

9. In an action for libel, where malice is shown, exemplary damages may be added to the compensatory damages.—*Paxton v. Woodward*, 195.

## Malice—Inference of Fact.

10. Malice is an inference of fact, which the jury may draw from a libelous publication alone.—*Paxton v. Woodward*, 195.

## Evidence—Malice.

11. In an action by a school teacher for libel, evidence that defendant, after the publication of the alleged libel, had tried to have the certificate

of plaintiff as a school teacher revoked, is admissible to show malice, but not as a basis for extra compensation.—*Paxton v. Woodward*, 195.

#### Evidence—Malice,

12. In an action by a school teacher for libel, proof of statements made by defendant after the institution of the suit to the effect that he would take away plaintiff's license as a teacher is admissible to show malice, but not as a basis for extra compensation.—*Paxton v. Woodward*, 195.

#### Evidence—Motive—Pleadings.

13. In an action for libel it is not error to allow the defendant, as a witness, to be interrogated with respect to his motive in using certain language in the article alleged to be libelous, and to permit him to explain statements therein—whether they were true, and as to the source of his information with respect to their truth—where such facts are involved in the issues presented by the pleadings.—*Paxton v. Woodward*, 195.

#### Profession—Complaint—Damages to Plaintiff as Individual.

14. In an action for libel where there is no suggestion in the complaint that plaintiff was damaged as an individual, but only that the injury was to him in respect to his profession, there can be no recovery of damages to plaintiff as an individual.—*Paxton v. Woodward*, 195.

#### *Per Se*—Publication—Presumptions—Nominal Damages.

15. Where a false and unprivileged publication possessing the ingredients that stamp it as libelous *per se* is established, injury is presumed to ensue therefrom, and affords ground for the allowance of at least nominal damages.—*Paxton v. Woodward*, 195.

#### Constitution—Duty of Jury—Instructions.

16. While the Constitution, Article III, Section 10, provides, among other things, that in all suits and prosecutions for libel the jury shall determine the law as well as the facts, under the direction of the court, yet, it being the duty of the court to give the jury a correct declaration of the legal principles involved, an erroneous instruction to the prejudice of plaintiff is cause for reversal.—*Paxton v. Woodward*, 195.

### LIMITATIONS.

#### Statute—Contracts—Declaration of Trust.

1. Under Compiled Statutes, Section 41, as amended by Session Laws 1889, p. 172, providing that an action on any contract or liability founded upon an instrument in writing shall be commenced within eight years, an action to enforce a liability evidenced by a declaration of trust, in which a complaint was filed within eight years after a certain payment under the declaration became due, was commenced in time.—*Goodell v. Sanford et al.*, 163.

#### Water Rights—Prescription.

2. A right of prescription is limited by the character and extent of the user during the period requisite to acquire the right.—*Chessman v. Hale*, 577.

### LIVE STOCK.

See RAILROADS, 1.

## MALICE.

See, also, LIBEL, 9, 10, 11, 12

## Libelous Publication.

1. Malice is an inference of fact, which the jury may draw from a libelous publication alone.—*Paxton v. Woodward*, 195.

## MASTER AND SERVANT.

## Safe Place to Work—Negligence.

1. While a master is bound to use reasonable diligence to provide and maintain a safe place to work, such rule does not apply to a case where servants are creating the place of work, when it is constantly being changed in character by their labor, when it only becomes dangerous by the carelessness or negligence of the workmen, when the dangers which arise are very short-lived, or when by the negligence of the workmen the place is rendered unsafe without the master's fault or knowledge.—*Shaw v. New Year Gold Mines Co.*, 138.

## Failure to Adopt Rules—Negligence.

2. Mere failure of a master to adopt rules to prevent injury to a servant is not proof of negligence, unless it appears that the master, in the exercise of reasonable care, should have foreseen the necessity for such precaution.—*Shaw v. New Year Gold Mines Co.*, 138.

## Medical Services—Agency—Telegrams.

3. In an action against a master for medical services rendered a servant who was injured while performing his duties, it appeared that one W. telegraphed to defendant from the place where the injury occurred, asking whether defendant would pay the "doctor's bill." Defendant answered by wire to the sender of the former message. *Held* that, since W. initiated the correspondence, the telegraph company was his agent, and not that of defendant, and hence defendant's reply telegram delivered to the company for transmission was the original, for evidentiary purposes, and not the reply telegram delivered by the telegraph company to W.—*Bond v. Hurd*, 314.

## Medical Services—Agency.

4. Where an agent was authorized by a master to employ medical assistance for an injured servant, such agent had no authority to delegate to a physician employed authority to employ an assistant.—*Bond v. Hurd*, 314.

## MEASURE OF DAMAGES.

## Claim and Delivery—Wrongful Seizure.

1. In an action in claim and delivery, brought by a mortgagee for the wrongful seizure of property under a writ of execution, the measure of damages if return of the goods cannot be had is the value of the goods up to the amount of the indebtedness, with accrued interest, and not the value of the property and the amount of the indebtedness with interest.—*Gallich v. Bordeaux et al.*, 328.

## Pollution of Streams.

2. The measure of damages for permanent injury to land, resulting from the poisoning of the waters of a stream, whereby its value for agricultural

purposes is absolutely destroyed, is the difference between the value of the land prior to the injury and its value after the injury.—*Watson et al. v. Colusa-Parrot M. & S. Co.*, 513.

#### Pollution of Streams—Damages Recoverable—For What Period.

3. Where several years elapse before a total and permanent injury to lands for agricultural purposes by the pollution of a stream is completed, the owners are entitled to recover damages for the yearly injury to their crops caused by the continuing nuisance, until the land was so totally and permanently injured; but no damages are recoverable for injury to the crops after such permanent damage.—*Watson et al. v. Colusa-Parrot M. & S. Co.*, 513.

#### MINES AND MINING.

#### Personal Injuries—Evidence—Insufficiency.

1. In an action against a mine owner for injuries to a miner caused by an explosion, evidence held not to justify submission of the issue of defendant's negligence.—*Shaw v. New Year Gold Mines Co.*, 138.

#### Action to Quiet Title—"Adverse Party"—Lease—Appeal—Notice.

2. In an action by plaintiffs against their lessee and defendant to quiet title to mining property, held, that, under the particular circumstances, the lessee was not an "adverse party" (within the meaning of the Code of Civil Procedure, Section 1724) on whom defendants were required to serve notice of appeal.—*Merk et al. v. Bowery Mining Co.*, 298.

#### Option to Purchase—Price—Installments—Return—Forfeiture.

3. Where plaintiffs gave an option to purchase their mining property by the payment of the price in installments at certain dates, time being of the essence, they were not required, on declaring a forfeiture for failure to pay the price as required, to return an installment paid.—*Merk et al. v. Bowery Mining Co.*, 298.

#### Option to Purchase—Time—Essence.

4. Time is of the essence of an option to purchase mining property.—*Merk et al. v. Bowery Mining Co.*, 298.

#### Option to Purchase—Leases—Extension.

5. Where a lease of mining property for royalties gave the lessee an option to purchase by paying in installments, and the time for payment of some installments was extended by an agreement which provided that the extension applied only to the payments for purchase, and did not affect the original contract in any other respect, the lease was not extended.—*Merk et al. v. Bowery Mining Co.*, 298.

#### Leases—Extension—Modification of Original Contract.

6. A contract leasing and giving an option to purchase mining property provided for the payment of royalties and of the price in installments if the option should be exercised, and declared that, if the lessee should not perform all the conditions, the agreement should be "void *ab initio*." An extension of time for the payment of installments was given, the supplemental agreement granting it providing that, if the lessee should fail to comply with the contract as modified, such failure should cause a forfeiture. Held, that this modified the provision of the original contract that failure to perform should render it void *ab initio*.—*Merk et al. v. Bowery Mining Co.*, 298.

## Mining and Reduction—Nuisances—Pollution of Streams—Liability.

7. Where a nuisance arises from the individual acts of different mining and reduction companies, which have discharged deleterious and poisonous matter into the waters of a creek, and the injury is not caused by the joint acts of defendant and any other corporation, each company is liable to the person injured for the damage caused by its own wrongful acts, and none other, and the full damage must be apportioned among all the wrongdoers. *Watson et al. v. Colusa-Parrot M. & S. Co.*, 513.

## Mining and Reduction—Pollution of Streams — Damages — Difficulty of Ascertaining.

8. The mere fact that it is difficult to determine what part of the damage was occasioned by the acts of the defendant mining and smelting company, in an action for damages for injury to lands by the pollution of a stream, it appearing that other like companies contributed to the injury, is no objection to the relief asked.—*Watson et al. v. Colusa-Parrot M. & S. Co.*, 513.

## Directors—Redemption of Mining Property and Working Same as Their Own—Accounting.

9. Where directors redeemed corporate mining property, sold under execution, and held and worked it as their own, they were entitled, on being sued by the stockholders, to obtain an accounting and to a credit for whatever money they had actually paid out for the use and benefit of the company, such as money paid for the redemption of the property, in satisfaction of *bona fide* claims against the same, with interest, and also for the reasonable expenses of extracting ore from the property after redemption.—*Coombs et al. v. Barker et al.*, 526.

## Placer Mining—Pollution of Stream—Injury to Land.

10. Under Civil Code, Sections 1880 and 4603, an appropriator of an upper water right who, in a contract to deliver it to a lower owner of land at a certain place, has reserved to himself the right to use the water for placer mining purposes, acquires no title to the water itself, or any right to pollute the water to any greater extent than is permitted by law; and, while he has a right to a reasonable use of the water for the purposes specified, although such use does result in fouling it to some extent, yet he cannot cover the lower proprietor's land with mining debris, so as to render it valueless.—*Chessman v. Hale*, 577.

## Water Rights—Use—Placer Mining—Nuisances.

11. The use of water by an upper appropriator in such a way as to carry sand, gravel and mining debris over the land of a lower proprietor, so as to render it valueless, constitutes a nuisance, both at common law, and under Civil Code, Section 4550, and Code of Civil Procedure, Section 1300.—*Chessman v. Hale*, 577.

## MORTGAGES.

## Chattel—Mortgagor—Possession—Conversion.

1. Where a mortgagee of a chattel rightfully in possession thereof sells it to another, the mortgagor, who has neither paid nor tendered the mortgage indebtedness, has no right of possession such as to entitle him to maintain conversion against the purchaser.—*Potter v. Lohse*, 91.

## Sale of Chattel—Purchaser—Subrogation.

2. A *bona fide* purchaser of property for value from a pledgee of the same,



who sold it in violation of the pledge, succeeds to all the rights of the pledgee, and under Civil Code, Section 4602, which makes the rule the same when the reason is the same, a purchaser from a chattel mortgagee will likewise succeed to the rights of his grantor with respect to the property purchased, on the principle of subrogation, although there is no contract of assignment between him and his grantee.—*Potter v. Lohse*, 91.

#### Mortgages—Sale of Chattel—Conversion—Inconsistent Defenses.

3. A defendant may plead inconsistent defenses in the same answer, and may rely on them at the trial, subject to instructions as to their proper effect. Thus defendant in conversion may assert rights as absolute owner and as mortgagee.—*Potter v. Lohse*, 91.

#### Chattel—Acknowledgment of Mortgagor's Title.

4. The taking of a mortgage on a chattel by defendant's grantor in January is no acknowledgment by defendant, who purchased the chattel from his grantor in the following March, of the mortgagor's title.—*Potter v. Lohse*, 91.

#### Nature—Security.

5. A mortgage itself does not create or alienate an estate in real property, but is a mere security for the payment of a debt or the discharge of an obligation. (Section 3810 *et seq.*, Civil Code.)—*Mueller v. Renkes*, 100.

#### Conveyance—Chattel Interest.

6. While a mortgage is a conveyance (Section 1642, Civil Code), it is a conveyance of only a chattel interest.—*Mueller v. Renkes*, 100.

#### Cancellation—Release—Consent of Mortgagor.

7. A mortgage being a mere lien executed for the benefit of the mortgagee, it may be canceled or released by him at any time with or without consideration, and with or without the consent of the mortgagor.—*Mueller v. Renkes*, 100.

#### Real Estate—Liability of Purchaser.

8. The purchaser of mortgaged real estate does not thereby become personally liable for the indebtedness.—*Mueller v. Renkes*, 100.

#### Release—Effect.

9. When a mortgage is released, a *bona fide* purchaser holds the premises free of the mortgage, whether the purchase was made prior or subsequent to the release.—*Mueller v. Renkes*, 100.

#### Release—Setting Aside—Burden of Proof.

10. Under Civil Code, Section 2170, one attacking the release of a mortgage, which was given to him and released by himself, in the manner prescribed in Civil Code, Section 3845, assumed the burden of showing the existence of facts sufficient to warrant a court of equity in setting it aside.—*Mueller v. Renkes*, 100.

#### Discharge—Suit at Law—Liens—Findings.

11. One who had a mortgage on lands securing his debt discharged the same of record, and subsequently sued at law on the note which was secured by the mortgage, attached the land which had been mortgaged, and pur-

chased it at judicial sale, the land having before the discharge of the mortgage been conveyed by the mortgagor to a third person. *Held*, in a suit by such person to quiet title, that a finding that the mortgage was not a lien on the property at the time the suit to quiet title was commenced, was warranted.—*Mueller v. Renkes*, 100.

**Notaries—Acknowledgment—False Certificate—Measure of damages.**

12. In an action against a notary for falsely certifying to an acknowledgment of a mortgage, on the security represented by which plaintiff advanced money, the measure of damages was the value of the security which plaintiff would have received, had the mortgage been valid, not exceeding the amount loaned by plaintiff, and not the value of the property described in the mortgage.—*Mahoney v. Dixon et al.*, 107.

**Notaries—False Certificate—Damages—Burden of Proof.**

13. In an action against a notary for falsely certifying to an acknowledgment of a mortgage, on the security represented by which plaintiff advanced a loan, the burden was on plaintiff to show the value of the security which he would have received had the mortgage been valid.—*Mahoney v. Dixon et al.*, 107.

**Deed Absolute on Its Face—Existence of Debt.**

14. No conveyance absolute on its face can be a mortgage unless made to secure the payment of a debt or the performance of a duty.—*Morrison v. Jones et al.*, 154.

**Deed—Security for Debt.**

15. A lease and option to purchase was assigned to secure a debt, the assignee to collect and account for the rents. Later the assignor deeded to the assignee, for a consideration much larger than the original debt, all her right and title to the property, the assignee agreeing to reassign if the assignor should pay him the consideration expressed in the deed before exercise of the option, and to reassign thereafter on payment of a larger sum. *Held*, that the deed was not a mortgage, there being no debt secured.—*Morrison v. Jones et al.*, 154.

**Deeds—Concurrent Agreement—Evidence.**

16. In an action to have a deed decreed a mortgage, an agreement executed concurrently with the deed, whereby the grantee agreed to reconvey on certain conditions, was properly admitted in evidence.—*Morrison v. Jones et al.*, 154.

**Chattel—Validity—Bankruptcy.**

17. Under Civil Code, Section 4491, a mortgage of personalty and transfer thereunder are void against a trustee in bankruptcy where the mortgage was made more than fourteen months prior to the transfer.—*Stewart v. Hoffman*, 184.

**Not Executed as Prescribed by Law—Good Between Parties.**

18. A mortgage not executed in manner and form as prescribed by law, is good between the parties.—*Stewart v. Hoffman* (on rehearing), 190.

**Presumptions—Statutes.**

19. There not being in this state any restriction placed by law upon the mortgaging of any species of personal property, all such mortgages are

exempted from the operation of Section 4491 of the Civil Code, which provides that a transfer of certain personal property and every lien thereon, other than a mortgage "when allowed by law," is conclusively presumed to be fraudulent under certain circumstances, and the words "when allowed by law" are therefore superfluous.—*Stewart v. Hoffman* (on rehearing), 190.

# MUNICIPAL CORPORATIONS.

## Accounts—Presentation to Council—Claims for Personal Injuries.

1. Political Code, Sections 4811, 4812, requiring all accounts and demands against a city to be presented to the council, itemized and accompanied by affidavit with necessary vouchers, etc., within one year from the date the same accrued, and barring claims not so presented, do not apply to a claim for damages arising from personal injuries.—*Dawcs v. City of Great Falls*, 9.

## Indebtedness—Current Expenses—Review.

2. Under Session Laws 1903, page 42, providing that, even after a city has reached the constitutional limit of indebtedness, it still has power to pay its reasonable and necessary current expenses out of the cash in its treasury, the determination of what is a current expense is for the courts; but the determination of the city council as to whether a particular current expense is reasonable and necessary is not subject to review by the courts in the absence of fraud or abuse of discretion.—*Helena Water Works Co. v. City of Helena et al.*, 243.

## Current Expenses—Installation of Water System.

3. Session Laws 1903, page 42, was passed immediately after a holding by the supreme court that a city which had reached the constitutional limit of indebtedness had no power to pay out funds for any purpose, and provided that, even after a city had reached the constitutional limit of indebtedness, it should still have power to manage and conduct its affairs on a cash basis, and pay its reasonable and necessary current expenses. *Held*, that an expenditure to install and operate a water system to belong to the city is not for current expenses, and not authorized by the statute.—*Helena Water Works Co. v. City of Helena et al.*, 243.

## Personal Injuries—Sidewalks—Instructions—Harmless Error.

4. The giving of instructions, in an action for damages for personal injuries resulting from a defective sidewalk, which misnamed the street where the accident was alleged to have occurred, will not justify the reversal of a judgment in favor of plaintiff, where it appears that the rights of appellant were not prejudiced by such obvious mistake or clerical error.—*Pryor v. City of Walkerville*, 618.

# NEGLIGENCE.

## Burden of Proof—Proximate Cause.

1. In an ordinary case of negligence, the burden of proof is upon plaintiff to show by competent evidence the negligence of defendant as alleged, and also that such negligence was the proximate cause of plaintiff's injury.—*Shaw v. New Year Gold Mines Co.*, 138.

## Appeal—Nonsuit—Evidence—Proximate Cause.

2. To justify reversal on appeal from a nonsuit in an action for personal injuries, the evidence must not leave either the negligence of defendant, or

that it was the proximate cause of the injury, to conjecture; and, if it is equally consonant with some theory inconsistent with either of these facts, it does not tend to prove them, within the rule that whatever the evidence tends to prove will on such an appeal be taken as established.—*Shaw v. New Year Gold Mines Co.*, 138.

#### Master and Servant—Safe Place to Work.

3. While a master is bound to use reasonable diligence to provide and maintain a safe place to work, such rule does not apply to a case where servants are creating the place of work, when it is constantly being changed in character by their labor, when it only becomes dangerous by the carelessness or negligence of the workmen, when the dangers which arise are very short-lived, or when by the negligence of the workmen the place is rendered unsafe without the master's fault or knowledge.—*Shaw v. New Year Gold Mines Co.*, 138.

#### Master and Servant—Failure to Adopt Rules.

4. Mere failure of a master to adopt rules to prevent injury to a servant is not proof of negligence, unless it appears that the master, in the exercise of reasonable care, should have foreseen the necessity for such precaution.—*Shaw v. New Year Gold Mines Co.*, 138.

#### Railroads—Killing Live Stock—Pleadings.

5. In an action under Civil Code, Section 950, an allegation of negligence in the operation of the train is necessary.—*Beaudin v. Oregon Short Line R. R. Co.*, 238.

#### New Trial—Newly Discovered Evidence—Presumptions.

6. Every presumption that he could have secured the testimony for the former trial will be indulged against the movant for a new trial on the ground of newly discovered evidence; hence we must negative any negligence on his part.—*In re Colbert's Estate* (on rehearing), 461.

#### Contributory—Defense—Must be Plead.

7. Contributory negligence is a defense which, in order to be relied on, must be pleaded by defendant.—*Orient Insurance Co. v. Northern Pac. Ry. Co.*, 502.

#### Contributory—Pleadings—Complaint.

8. The existence of contributory negligence need not be negatived in the complaint, unless it appears from other allegations therein that the proximate cause of the injury was the act of plaintiff.—*Orient Insurance Co. v. Northern Pac. Ry. Co.*, 502.

#### Pleadings—Contributory Negligence—Surplusage.

9. An allegation in the complaint in an action against a railroad company to recover damages for the burning of property by sparks from a locomotive, that the property was destroyed by negligence of defendant, and without fault of the owners or plaintiff, denied generally in the answer, is not sufficient to raise the issue of contributory negligence of plaintiff. This allegation is surplusage and need not be proved.—*Orient Insurance Co. v. Northern Pac. Ry. Co.*, 502.

## Contributory—Pleadings—Complaint—Defense.

10. Where the complaint, in an action to recover damages for personal injuries, does not show that plaintiff was "free from any contributory negligence," but alleges that she was injured "without any fault or negligence on her part," the existence of contributory negligence is a matter of defense. *Pryor v. City of Walkerville*, 618.

## NEGOTIABLE INSTRUMENTS.

## Fraud—Equity—Bill—Sufficiency.

1. Where a bill to set aside a note, secured by a chattel mortgage, on the ground of fraud, alleged facts showing a mere failure of consideration for the note, and did not allege either that defendant was insolvent, that plaintiff did not have an adequate remedy at law, or that defendant had threatened to dispose of the note before maturity to a *bona fide* purchaser, but alleged that defendant was in possession thereof and refused to deliver the same to plaintiff, it was insufficient.—*Handley v. Sprinkle*, 57.

## Assignment—Security for Pre-existing Debt—Fraud—Defenses.

2. Where defendant assigned notes given as consideration on the sale of a business, which he induced by fraud, to a third person as security for a pre-existing debt, such third person was not a *bona fide* holder, and the notes were subject to all the defenses which might have been urged against them in the hands of defendant.—*Sathre v. Rolfe et al.*, 85.

## NEW TRIAL.

See, also, APPEAL, 7.

## Statement—Appeal—Judgment.

1. Under Code of Civil Procedure, Section 1736, on an appeal from a final judgment any question of law which is raised in the statement, if otherwise properly presented, will be considered and passed on by the supreme court; and thus, while it cannot consider the question of the insufficiency of the evidence to support the verdict or decision, it can determine the question of law as to whether there is any evidence to support such verdict or decision.—*Mahoney v. Dixon et al.*, 107.

## Equity Case—Notice of Intention—When to be Filed.

2. In an equity case, it is essential to the validity of a motion for a new trial that the notice of intention be filed within ten days after notice of the decision of the court.—*Spencer v. Hersam et al.*, 120.

## Instructions—Conflicting—Abuse of Discretion.

3. Where instructions warranted a finding for defendant, but were inconsistent and conflicting with other instructions, the court abused its discretion in granting a new trial on the ground that the verdict was against the law because contrary to the instructions, since the verdict, while opposed to some of the instructions, was warranted by others.—*Cotter v. Butte & Ruby Valley Smelting Co.*, 129.

## Newly Discovered Evidence—Affidavit—Insufficiency.

4. Affidavit in support of a motion for a new trial on the ground of newly discovered evidence, examined and held insufficient to show diligence required by Code of Civil Procedure, Section 1171.—*Nicholson v. Metcalf*, 276.

**Bill of Exceptions—Specification of Errors.**

5. Where a motion for a new trial was made on a bill of exceptions, and not on a statement of facts, it was not objectionable for failure of such bill to contain a specification of errors.—*Bond v. Hurd*, 314.

**Appeal—Specification of Errors.**

6. Where an appeal was taken from a judgment and from an order denying a new trial, a motion to dismiss the appeal on the ground that the record or statement on the motion for a new trial did not contain a specification of errors was properly denied, since such objection was not ground for dismissal of the appeal from the judgment.—*Bond v. Hurd*, 314.

**Appeal—Statement—Bill of Exceptions.**

7. A bill of exceptions not made a part of the statement on motion for a new trial cannot be considered on appeal from the order denying it.—*In re Colbert's Estate*, 461.

**Newly Discovered Evidence—Affidavit—Sufficiency—Lost Wills.**

8. The uncontradicted affidavits for a new trial on the ground of newly discovered evidence in proceedings to establish a lost will showed diligence on the part of proponent, and that a newly discovered witness would testify that he was shown the will by the testator, and was familiar with its contents, and that after his death he was shown the will by, and recognized it in the hands of, a subscribing witness to the will, such evidence of its existence being the essential evidence which proponent lacked on the trial. *Held*, that the court abused its discretion in not granting a new trial.—*In re Colbert's Estate*, 461.

**Newly Discovered Evidence—Affidavits—Insufficiency.**

9. The affidavit of proponent in support of a motion for a new trial on the ground of newly discovered evidence, in proceedings to establish a lost will, averred that since the dismissal of his petition he had discovered a witness who would testify that he was shown the will by testator, and that he saw it after his death; that proponent was unable to discover the evidence prior to the trial, although he had inquired of different persons living in the vicinity, and every person whom he thought had any knowledge of the circumstances. The affidavit of the witness in question showed that prior to the death of testator he left the vicinity, but returned after testator's death and occupied a house on testator's property. It did not appear how the evidence was discovered, or that the witness had not lived in the vicinity from a few weeks after testator's death to the time of the trial. *Held*, that there was not a sufficient showing of diligence on the part of the movant to entitle him to a new trial.—*In re Colbert's Estate* (on rehearing), 477.

**Newly Discovered Evidence—Presumptions—Negligence.**

10. Every presumption that he could have secured the testimony for the former trial will be indulged against the movant for a new trial on the ground of newly discovered evidence; hence he must negative any negligence on his part.—*In re Colbert's Estate* (on rehearing), 477.

**Newly Discovered Evidence—Affidavit—Particularity.**

11. Affidavits filed in support of a motion for a new trial on the ground of newly discovered evidence should state with particularity what was done toward obtaining the new evidence, and how and when it was discovered, so as to give the adverse party an opportunity to traverse the statements made in the affidavit.—*In re Colbert's Estate* (on rehearing), 477.

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12. A statement in an affidavit filed in support of a motion for a new trial on the ground of newly discovered evidence, that the movant has made inquiry of every person he thought might know anything about the case, is insufficient.—*In re Colbert's Estate* (on rehearing), 477.

## Newly Discovered Evidence—Duty of Trial Court.

13. It is incumbent upon the trial court, on the hearing of a motion for a new trial on the ground of newly discovered evidence, to take into consideration the weight and importance of the new evidence, its bearing in connection with the evidence on the former trial, and even the credibility of the witnesses.—*In re Colbert's Estate* (on rehearing), 477.

## Newly Discovered Evidence—Cumulative—Different Result on Re-Trial.

14. A motion for a new trial on the ground of newly discovered evidence will not be granted, unless it clearly appears that such evidence is not cumulative merely, but makes it clearly probable that it will produce a different result on re-trial.—*In re Colbert's Estate* (on rehearing), 477.

## Newly Discovered Evidence—Trial Court—Presumptions.

15. The trial court, having heard the testimony given by the witnesses *ore tenus* and observed their conduct and demeanor on the witness stand, is in a better position to weigh it than is the appellate court, and the presumption will be indulged, in the absence of any showing to the contrary, that its action in passing upon a motion for a new trial on the ground of newly discovered evidence, was based upon a due consideration of these conditions.—*In re Colbert's Estate* (on rehearing), 477.

## Newly Discovered Evidence—Trial Court—Discretion.

16. Applications for new trials on the ground of newly discovered evidence are addressed to the sound legal discretion of the trial judge, and his action thereon will not be disturbed on appeal, except for a clear and unmistakable abuse of such discretion.—*In re Colbert's Estate* (on rehearing), 477.

## Newly Discovered Evidence—Affidavit.

17. Refusal of new trial, asked for on the ground of newly discovered evidence, is not error, in the absence of an affidavit showing that the evidence was not known to movant at the time of the trial.—*Spencer v. Spencer*, 631.

## Jury—Fraud—Undue Influence—Evidence.

18. In the absence of a statute, and in order to secure freedom of thought, thorough discussion, and independence of action, as well as to prevent undue influence and fraud, the construction or weight given by the jury to evidence submitted to it, is not a subject of inquiry upon a motion for a new trial.—*Spencer v. Spencer*, 631.

## NON-EXPERT WITNESSES.

See EVIDENCE, 42, 43, 51.

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## Deeds—Mortgages.

3. In an action to have a deed declared a mortgage the court may, on defendant's motion for a nonsuit, decree the instrument to be a deed, though there is no technical nonsuit in an equitable action.—*Morrison v. Jones et al.*, 154.

## Practice—Effect—Burden of Proof.

4. Defendant, if satisfied that the evidence introduced by plaintiff is not sufficient to warrant a recovery, may move for a nonsuit, which raises a question of law, admitting the truth of the evidence but questioning its sufficiency; or, proceeding upon the theory that the jury will not believe plaintiff's testimony, may have the case submitted to the jury upon plaintiff's evidence alone, in which case the question submitted is one of fact, with the burden of proof on plaintiff to establish by a preponderance of the evidence the allegations of his complaint.—*Brophy v. Idaho Produce & Provision Co.*, 279.

## NOTARIES PUBLIC.

## False Certificates—Action for Damages.

1. There can be no recovery in damages against a notary for falsely certifying to an acknowledgment unless the person seeking such recovery relied upon the statements contained in the notary's certificate, so that the damages to him were proximately caused by the notary's wrongful act.—*Mahoney v. Dixon et al.*, 107.

## False Certificates—Measure of Damages.

2. In an action against a notary for falsely certifying to an acknowledgment of a mortgage, on the security represented by which plaintiff advanced money, the measure of damages was the value of the security which plaintiff would have received, had the mortgage been valid, not exceeding the amount loaned by plaintiff, and not the value of the property described in the mortgage.—*Mahoney v. Dixon et al.*, 107.

## False Certificates—Action for Damages—Burden of Proof.

3. In an action against a notary for falsely certifying to an acknowledgment of a mortgage, on the security represented by which plaintiff advanced a loan, the burden was on plaintiff to show the value of the security which he would have received had the mortgage been valid.—*Mahoney v. Dixon et al.*, 107.

## NOTES.

See, also, NEGOTIABLE INSTRUMENTS.

## Corporate Notes—Directors—Fraud—Action—Banks—Necessary Parties.

1. Corporate notes executed by the directors to a bank cannot be set aside for fraud or any other reason, in an action by stockholders against the

directors to which the bank has not been made a party.—*McConnell et al. v. Combination M. & M. Co.* (on rehearing), 563.

NOTICE.

Unrecorded Deed—Payment of Taxes.

1. Payment of taxes by the grantee in an unrecorded deed is not notice to a subsequent purchaser.—*Sheldon v. Powell*, 249.

Deed Not of Record—Grantee—Burden of Proof.

2. The burden is on the grantee in an unrecorded deed to show that a subsequent purchaser had notice.—*Sheldon v. Powell*, 249.

Justice Courts—Stipulation—Appeal.

3. Where defendants appear in an action before a justice, file their separate answers, and by stipulation agree to a particular time for trial, they are chargeable with actual notice of all subsequent proceedings, and, though they do not appear at said time, their remedy is by appeal, which excludes a remedy by writ of *certiorari*.—*State ex rel. Grissom v. Justice Court et al.*, 258.

Continuing Nuisances—Abatement.

4. Under Civil Code, Section 4554, it is not necessary to give notice to one who continues a nuisance, to abate it, before bringing suit for damages arising therefrom.—*Watson et al. v. Colusa-Parrot M. & S. Co.*, 513.

NUISANCES.

See, also, TORTS, and WATERS AND WATER RIGHTS.

Mining and Reduction—Pollution of Streams—Liability.

1. Where a nuisance arises from the individual acts of different mining and reduction companies, which have discharged deleterious and poisonous matter into the waters of a creek, and the injury is not caused by the joint acts of defendant and any other corporation, each company is liable to the person injured for the damage caused by its own wrongful acts, and none other, and the full damage must be apportioned among all the wrongdoers.—*Watson et al. v. Colusa-Parrot M. & S. Co.*, 513.

Mining and Reduction—Pollution of Streams—Damages—Difficulty of Ascertaining.

2. The mere fact that it is difficult to determine what part of the damage was occasioned by the acts of the defendant mining and smelting company, in an action for damages for injury to lands by the pollution of a stream, it appearing that other like companies contributed to the injury, is no objection to the relief asked.—*Watson et al. v. Colusa-Parrot M. & S. Co.*, 513.

Continuing—Predecessors in Interest—Who Liable for Damages.

3. A person continuing a nuisance is not liable for damages caused by the operation of the nuisance by his predecessors in interest, but redress must be had in an action against such predecessors for damages prior to the date when he went into possession.—*Watson et al. v. Colusa-Parrot M. & S. Co.*, 513.

## Continuing—Abatement—Notice.

4. Under Civil Code, Section 4554, it is not necessary to give notice to one who continues a nuisance, to abate it, before bringing suit for damages arising therefrom.—*Watson et al. v. Colusa-Parrot M. & S. Co.*, 513.

## Water Rights—Use—Placer Mining.

5. The use of water by an upper appropriator in such a way as to carry sand, gravel and mining debris over the land of a lower proprietor, so as to render it valueless, constitutes a nuisance, both at common law and under Civil Code, Section 4550, and Code of Civil Procedure, Section 1300.—*Chessman v. Hale*, 577.

## Action for Damages—Right of Jury Trial.

6. Under the Constitution of the United States, Seventh Amendment, in force at the time of the adoption of the Constitution of Montana, and under Article III, Section 23, of the Constitution of Montana, and Code of Civil Procedure, Section 1300, and Civil Code, Sections 4550, 4555 and 4590, plaintiff in an action for damages for the maintenance of a nuisance is entitled to a trial by jury of his right to damages, although he also asks for the equitable relief of injunction to restrain the continuance of the acts complained of.—*Chessman v. Hale*, 577.

## Action for Damages—Jury Trial—How Waived.

7. Under Constitution, Article III, Sections 23 and 29, and Code of Civil Procedure, Section 1110, prescribing the manner in which a jury in a civil case may be waived, plaintiff's right to a jury trial in an action for damages for a nuisance could only be waived in one of the modes specified, and was not waived by his failure to demand a trial by jury, or to submit to the court the question as to whether he had a right to a jury trial, or by endeavoring to maintain his claim under the theory of the case which the court, by its ruling that it was an action in equity, compelled him to adopt.—*Chessman v. Hale*, 577.

## OBJECTIONS.

## Complaint—Appeal.

1. *Obiter*: An objection to a complaint, not made in the district court, will not be considered on appeal.—*McConnell et al. v. Combination M. & M. Co.* (on rehearing), 563.

## Complaint—Verification—Appeal.

2. An objection to the verification of a complaint cannot be made for the first time in the appellate court.—*Pryor v. City of Walkerville*, 618.

## OPTIONS TO PURCHASE.

See, also, LEASES, 8, 10.

ACTIONS, 7.

## Mines—Time—Essence.

1. Time is of the essence of an option to purchase mining property.—*Merk et al. v. Bowery Mining Co.*, 298.

## Mines—Leases—Extension.

2. Where a lease of mining property for royalties gave the lessee an option to purchase by paying in installments, and the time for payment of some

installments was extended by an agreement which provided that the extension applied only to the payments for purchase, and did not affect the original contract in any other respect, the lease was not extended.—*Merk et al. v. Bowery Mining Co.*, 298.

## PARTIES.

## Conversion—Mortgages.

1. In an action for conversion by the mortgagor of a chattel against a purchaser from the mortgagee, who has theretofore become subrogated to the rights of such mortgagee by operation of law, the mortgagee is not a necessary party to give defendant complete protection against plaintiff.—*Potter v. Lohse*, 91.

## Adverse—Action to Quiet Title—Appeal—Notice.

2. In an action by plaintiffs against their lessee and defendant to quiet title to mining property, *held*, that, under the particular circumstances, the lessee was not an "adverse party" (within the meaning of Code of Civil Procedure, Section 1724) on whom defendants were required to serve notice of appeal.—*Merk et al. v. Bowery Mining Co.*, 298.

## Sureties—Constables—Claim and Delivery.

3. The action of claim and delivery lies only against the party in possession, and when brought against a constable for the wrongful seizure of property under a writ of execution the sureties on his official bond are improperly joined as parties defendant, where they were not in any manner concerned with the seizure or detention of the property.—*Gallick v. Bordeaux et al.*, 328.

## Action to Quiet Title—Summons—Service—Disclaimer.

4. Where all the defendants in an action to quiet title, residing in the same county, were served with summons, and one defendant was served with a copy of the complaint as required by Code of Civil Procedure, Section 635, the fact that such defendant filed a disclaimer of any interest in the land did not affect the service on the other defendants; there being nothing to show that he was not made a defendant in good faith.—*Manile v. Casey et al.*, 408.

## Corporate Notes—Directors—Fraud—Action—Banks.

5. Corporate notes executed by the directors to a bank cannot be set aside for fraud or any other reason, in an action by stockholders against the directors to which the bank has not been made a party.—*McConnell et al. v. Combination M. & M. Co.* (on rehearing), 563.

## Indispensable—Partition—Wife of Tenant-in-Common.

6. Under Code of Civil Procedure, Section 1342, the wife of a defendant tenant-in-common, having an inchoate right of dower in an undivided share of the property, is an indispensable party to a suit for partition.—*Hurley v. O'Neill*, 595.

## PARTITION.

## Prior Agreement for—Burden of Proof.

1. In a suit for partition, the party who alleges prior partition or relies upon an oral agreement respecting it, has the burden of showing the existence of such agreement.—*Hurley v. O'Neill*, 595.

## Course When Not Feasible Without Prejudice to Owners

2. Where property is so situated that partition cannot be made without great prejudice to the owners, the court may, under Code of Civil Procedure, Section 1355, order a sale thereof.—*Hurley v. O'Neill*, 595.

## Dower—Wife of Tenant-in-Common—Indispensable Party.

3. Under Code of Civil Procedure, Section 1342, the wife of a defendant tenant-in-common, having an inchoate right of dower in an undivided share of the property, is an indispensable party to a suit for partition.—*Hurley v. O'Neill*, 595.

## PARTNERSHIP.

## Contracts—Authority of Partner—Evidence.

1. Where defendants claim that a certain contract was made with plaintiff's firm, which plaintiff denies, and according to defendants' claim it was made with both members of the firm, evidence as to whether plaintiff authorized his partner to enter into the contract for the firm is immaterial.—*McCormick v. Johnson et al.*, 266.

## Conversion of Firm Assets—Action by Partner—Complaint—Sufficiency.

2. A complaint alleged that plaintiff and defendants were partners, and that defendants withdrew a portion of the firm assets from a bank, and converted them to their own use; that thereafter defendants assigned all their interest in the partnership to plaintiff; and that on the settlement and dissolution of the firm the whole of the money so wrongfully converted was due and owing and belonged to plaintiff as a portion of his share. *Held*, that the complaint failed to state a cause of action, since defendants could not assign to plaintiff any right of action growing out of the misappropriation, and there was no allegation of an accounting, either in equity or by agreement, or that on such accounting the moneys converted were found to belong to plaintiff, the allegations that such moneys were owing plaintiff being a mere conclusion.—*Riddell v. Ramsey et al.*, 386.

## PLEADING AND PRACTICE—(Civil).

See, also, CONVERSION, 4.

## Claim and Delivery—Complaint.

1. Plaintiffs alleged that, being owners of certain capital stock in defendant company, they deposited it with the company, to be sold by defendant, and the proceeds used in paying its debts, in consideration of an agreement that plaintiffs should hold the offices of vice president, trustee and general manager and treasurer of the defendant until its business should be in successful operation; that defendant violated its agreement, and ejected plaintiffs from said offices, and had sold and issued the stock to others, and refused and failed to deliver it to the plaintiffs, or to pay plaintiffs the value thereof, though requested to do so. The prayer was for recovery of the possession of the stock, or its value in case delivery could not be had. *Held*, that the complaint did not state a cause of action in claim and delivery, as the statement that defendant had disposed of the stock showed that, at the commencement of the action, defendant did not wrongfully retain possession of the property from plaintiffs.—*Glass et al. v. Basin & Bay State M. Co.*, 21.

**Conversion.**

2. The complaint did not state a cause of action in conversion, as it did not show a general or special ownership in the property and a right to immediate possession at the time of the wrongful taking by defendant.—*Glass et al. v. Basin & Bay State M. Co.*, 21.

**Illegal Contract—Performance—Complaint.**

3. Plaintiffs could not recover as on a disaffirmance of an illegal contract, as the complaint showed performance on their part, and reliance on the contract.—*Glass et al. v. Basin & Bay State M. Co.*, 21.

**Election Contests—Statement—Sufficiency.**

4. Under Code of Civil Procedure, Section 2014, requiring that a person contesting an election shall file a statement setting forth certain facts and the particular grounds of such contest, verified by the affidavit of the contesting party that the matters therein contained are true, an affidavit was sufficient, though the grounds on which the contest was based were alleged on information and belief.—*Murphy v. Levengood*, 34.

**Election Contests—Statement—Contents.**

5. Code of Civil Procedure, Sections 2021, 2016, permitting the court to dismiss proceedings contesting an election, if the statement of the cause of contest is insufficient, and declaring that no statement of the grounds of contest will be rejected, nor the proceedings dismissed for want of form, if the grounds are alleged with such certainty as to advise defendant of the particular cause for which such election is contested, merely require that the contestant shall definitely apprise the contestee of the charges relied on, so that he may be prepared to meet them with appropriate proof.—*Murphy v. Levengood*, 34.

**Consolidation of Actions.**

6. Where actions are consolidated as authorized by Code of Civil Procedure, Section 1894, the court should require the pleadings to be reconstructed as in one suit.—*Handley v. Sprinkle*, 57.

**Equity—Notes—Fraud—Sufficiency of Bill.**

7. Where a bill to set aside a note, secured by a chattel mortgage, on the ground of fraud, alleged facts showing a mere failure of consideration for the note, and did not allege either that defendant was insolvent, that plaintiff did not have an adequate remedy at law, or that defendant had threatened to dispose of the note before maturity to a *bona fide* purchaser, but alleged that defendant was in possession thereof and refused to deliver the same to plaintiff, it was insufficient.—*Handley v. Sprinkle*, 57.

**Account Stated—Items—Copy of Account.**

8. Code of Civil Procedure, Section 743, providing that it is not necessary for a party to set forth in his pleading the items of the account therein alleged, but he must deliver to the adverse party, after demand, a copy of the account, applies to actions on open, unsettled accounts, and not to actions on accounts stated.—*Martin v. Heinze*, 68.

**Account Stated—Items—Fraud—Answer.**

9. An "account stated" is an agreement between the parties, either express or implied, that all the items are correct; this agreement is the cause of

action, hence, in an action on an account stated, the items of the original account may not be inquired into or surcharged, except upon the ground of fraud, error or mistake in the ascertainment of the balance, and then only when the fraud, error or mistake upon which the agreement is sought to be impeached is specifically alleged in the answer.—*Martin v. Heinze*, 68.

Equity—Subrogation—Defense.

10. Subrogation—an equitable defense—may be pleaded to a legal cause of action.—*Potter v. Lohse*, 91.

Answer—Inconsistent Defenses—Conversion.

11. A defendant may plead inconsistent defenses in the same answer, and may rely on them at the trial, subject to instructions as to their proper effect. Thus defendant in conversion may assert rights as absolute owner and as mortgagee.—*Potter v. Lohse*, 91.

Fraud—Complaint.

12. In an action to rescind a sale of real estate for fraud, an allegation that plaintiff relied on the representations made constituted a sufficient averment that he believed them to be true.—*Spencer v. Hersam et al.*, 120.

Libel—Justification.

13. Where an imputation complained of is a conclusion from certain facts, a plea of justification averring the existence of a state of facts which warrants the inference of the charge, is sufficient.—*Parton v. Woodward*, 195.

Libel *Per Se*—Pleadings—Proof—General Damages.

14. When the publication is libelous *per se*, the plaintiff may recover general damages without allegations or proof of special damages.—*Parton v. Woodward*, 195.

Libel—Words of Doubtful Significance.

15. Under Section 751, Code of Civil Procedure, when the words are unequivocal in their import and obviously defamatory, it is not necessary to employ colloquium or innuendo to explain their application and meaning; but if the words be of doubtful significance, or derive their libelous character not from their own intrinsic force, but from extraneous facts, it is necessary to allege the meaning intended, or set forth such extraneous facts by proper averments.—*Parton v. Woodward*, 195.

Libel—Malice.

16. In an action for libel, the existence of malice is not a necessary ingredient to entitle plaintiff to recover.—*Parton v. Woodward*, 195.

Libel—Complaint—Damages.

17. In an action for libel where there is no suggestion in the complaint that plaintiff was damaged as an individual, but only that the injury was to him in respect to his profession, there can be no recovery of damages to plaintiff as an individual.—*Parton v. Woodward*, 195.

Railroads—Killing Live Stock—Complaint.

18. In an action against a railroad under Civil Code, Section 950, it is necessary that the petition allege plaintiff's ownership or possession of land along or through which the railroad runs, and that the stock was killed at such place.—*Braudin v. Oregon Short Line R. R. Co.*, 238.



**Railroads—Killing Live Stock—Replication—Admission.**

19. In an action against a railroad under the statute, failure to deny an allegation of the answer that the place where the killing occurred was a public station amounted to an admission of such fact.—*Beaudin v. Oregon Short Line R. R. Co.*, 238.

**Railroads—Killing Live Stock—Pleading—Negligence.**

20. In an action under Civil Code, Section 950, no allegation of negligence in the operation of the train is necessary.—*Beaudin v. Oregon Short Line R. R. Co.*, 238.

**Justice Courts—Appeal—Certiorari—Notice.**

21. Where defendants appear in an action before a justice, file their separate answers, and by stipulation agree to a particular time for trial, they are chargeable with actual notice of all subsequent proceedings, and, though they do not appear at said time, their remedy is by appeal, which excludes a remedy by writ of certiorari.—*State ex rel. Grissom v. Justice Court et al.*, 258.

**Nonsuit—Submission of Case on Plaintiff's Testimony—Burden of Proof.**

22. Defendant, if satisfied that the evidence introduced by plaintiff is not sufficient to warrant a recovery, may move for nonsuit, which raises a question of law, admitting the truth of the evidence but questioning its sufficiency, or, proceeding upon the theory that the jury will not believe plaintiff's testimony, may have the case submitted to the jury upon plaintiff's evidence alone, in which case the question submitted is one of fact, with the burden of proof on plaintiff to establish by a preponderance of the evidence the allegations of his complaint.—*Brophy v. Idaho Produce & Provision Co.*, 279.

**Complaint—Relief.**

23. Under Code of Civil Procedure, Section 1003, providing that the court may grant relief consistent with the complaint, a prayer for such other and further relief as may be meet and agreeable to equity and good conscience warrants the granting of any relief to which plaintiff is entitled on the allegations and proof.—*Merk et al. v. Bowery Mining Co.*, 298.

**Adverse Claims—Complaint.**

24. Under Code of Civil Procedure, Section 1310, providing that an action may be brought by any person against another who claims an interest or estate in land adverse to him, to determine such adverse claim the complaint need only allege that plaintiff is the owner, and that defendant claims some adverse right, and a complaint is not objectionable because it alleges defendant's claim to be different from that set up in the answer.—*Merk et al. v. Bowery Mining Co.*, 298.

**Complaint—Change of Venue—Abridging Right.**

25. Where two of three causes of action alleged in a complaint were such that defendant was clearly entitled to a change of venue to the county in which he resided, plaintiff was not entitled to abridge such right by joining in the complaint a third cause of action which might be properly triable in the county where the suit was brought.—*Bond v. Hurd*, 314.

**Action on Contract—Complaint—Sufficiency.**

26. Code of Civil Procedure, Section 570, requires every action to be prosecuted in the name of the real party in interest. A count of a complaint

alleged that plaintiff granted to defendant the privilege of selling certain articles at a specified race track for a certain time, and that defendant used the privilege for such time, that it was reasonably worth a specified sum, that plaintiff owned the claim against defendant, and that defendant refused to pay. *Held*, that the count was not subject to an objection that it did not state a cause of action, on the ground that it did not allege that plaintiff was the owner of the privilege granted, that there was no allegation of value, and that it was not alleged that the sum claimed had not been paid.—*Harmon v. Fox*, 324.

#### Complaint—Defect—Waiver.

27. Where the complaint in an action to recover a sum alleged to be due plaintiff for a privilege granted defendant to sell certain articles in a certain territory was defective with reference to an allegation of nonpayment by defendant, the defect was cured by defendant's answer admitting nonpayment.—*Harmon v. Fox*, 324.

#### Implied Allegations.

28. Whatever is necessarily implied from an express allegation in a pleading need not otherwise be averred.—*Harmon v. Fox*, 324.

#### Claim and Delivery—Proof—Void Sale.

29. In an action in claim and delivery for property wrongfully seized under execution defendant could, under a general denial of plaintiff's ownership of the goods seized, show that a sale under which plaintiff claimed was void.—*Gallick v. Bordeaux et al.*, 328.

#### Claim and Delivery—Complaint—Requisites.

30. In an action in claim and delivery, in order to state a cause of action, the complaint must not only allege ownership or right of possession in the plaintiff, but it must allege the wrongful seizure and detention of the property by the defendant.—*Gallick v. Bordeaux et al.*, 328.

#### Answer—Amendment—Statute of Frauds - Replication.

31. Under Code of Civil Procedure, Section 1528, the filing of an amendment to defendant's answer pleading the statute of frauds to an action to recover the price of certain land sold did not require a replication.—*Duane v. Molinak*, 343.

#### Appeal from Justice Court.

32. The pleadings in the district court on an appeal from a justice or police court are governed by the same rules as pertain to pleadings in such courts.—*Duane v. Molinak*, 343.

#### Appeal Police Court—Statute of Frauds—Issue of Fact.

33. Where an action was brought in the police court to recover a balance due on a sale of land, and defendant answered, denying the allegations of the complaint, and alleging as a counterclaim damages arising from certain misrepresentations of plaintiff, and on appeal from the police court pleaded the statute of frauds by amendment, such pleadings raised issues of fact to be tried in the ordinary manner, and it was therefore error for the court to render judgment for defendant on the pleadings.—*Duane v. Molinak*, 343.

#### Partnership—Conversion of Firm Assets—Complaint—Sufficiency.

34. A complaint alleged that plaintiff and defendants were partners, and that defendants withdrew a portion of the firm assets from a bank, and

converted them to their own use; that thereafter defendants assigned all their interest in the partnership to plaintiff; and that on the settlement and dissolution of the firm the whole of the money so wrongfully converted was due and owing and belonged to plaintiff as a portion of his share. *Held*, that the complaint failed to state a cause of action, since defendants could not assign to plaintiff any right of action growing out of the misappropriation, and there was no allegation of an accounting, either in equity or by agreement, or that on such accounting the moneys converted were found to belong to plaintiff, the allegations that such moneys were owing plaintiff being a mere conclusion.—*Riddell v. Ramsay et al.*, 386.

#### Complaint—Summons—Two or More Defendants.

35. Code of Civil Procedure, Section 635, provides that "a copy of the complaint must be served with the summons unless two or more defendants reside in the same county, in which case a copy of the complaint need only be served on one of such defendants." *Held*, that where several defendants reside in the same county, and a copy of the complaint is served on one of them with the summons, a return of service need not show that defendants all reside in the county.—*Mantle v. Casey et al.*, 408.

#### Summons—Service—Two or More Defendants.

36. Where all the defendants in an action to quiet title, residing in the same county, were served with summons, and one defendant was served with a copy of the complaint as required by Code of Civil Procedure, Section 635, the fact that such defendant filed a disclaimer of any interest in the land did not affect the service on the other defendants; there being nothing to show that he was not made a defendant in good faith.—*Mantle v. Casey et al.*, 408.

#### Special Appearance—Effect on Time to Answer.

37. Under Code of Civil Procedure, Section 1020, providing that "if no answer has been filed within the time specified by the summons, or such further time as may have been granted, the clerk must enter the default of defendant," a special appearance for the purpose of moving to quash the service of summons did not extend the time for a general appearance and answering to the merits.—*Mantle v. Casey et al.*, 408.

#### Default—Striking Answer from Files.

38. An answer filed after defendant's default for failure to answer has been entered will be stricken from the files; the proper practice being to move to set aside the default, tendering the answer with the motion.—*Mantle v. Casey et al.*, 408.

#### Special Appearance—Effect—Default—Surprise.

39. The failure of defendant's counsel to know that a special appearance to move to quash the service of summons did not extend the time for a general appearance and answer, is not such surprise or excusable neglect as is contemplated by Code of Civil Procedure, Section 774, as a reason for setting aside a default.—*Mantle v. Casey et al.*, 408.

#### Quieting Title—Allegation of Ownership—Appeal.

40. Under Code of Civil Procedure, Section 1310, providing that an action may be brought by any person against another who claims an estate or interest in real property adverse to him, to determine such adverse claim, a complaint averring that plaintiff "claims to be the owner" of the property in question, and "claims title in fee," and that defendant "claims an estate

or interest" therein adverse to plaintiff, which claim of defendant is without right, was not objectionable for the first time on appeal, on the ground that it nowhere pleads that plaintiff is the owner of the property, and pleads no better title for plaintiff than that set forth for defendant.—*Pollock Mining & Milling Co. v. Davenport*, 452; *Glengarry Mining & Milling Co. v. Davenport*, 454.

#### Probate of Wills—Contests—Practice.

41. Under Code of Civil Procedure, Sections 2340-2346, the proponent of a will must first make out a *prima facie* case; that is, make such proof as would entitle the will to probate in the absence of a contest. The contestant then attacks its validity, the proponent defends the same, and the contestant rebuts the testimony of the proponent, who may sur-rebut any new testimony; but the contestant has the right to open and close.—*In re Colbert's Estate*, 461.

#### Act of God—Defense—Must be Plead.

42. The act of God is a defense which must be pleaded, to be available.—*Orient Insurance Co. v. Northern Pac. Ry. Co.*, 502.

#### Contributory Negligence—Defense—Must be Plead.

43. Contributory negligence is a defense which, in order to be relied on, must be pleaded by defendant.—*Orient Insurance Co. v. Northern Pac. Ry. Co.*, 502.

#### Contributory Negligence—Complaint.

44. The existence of contributory negligence need not be negatived in the complaint, unless it appears from other allegations therein that the proximate cause of the injury was the act of the plaintiff.—*Orient Insurance Co. v. Northern Pac. Ry. Co.*, 502.

#### Contributory Negligence—Surplusage.

45. An allegation in the complaint in an action against a railroad company to recover damages for the burning of property by sparks from a locomotive, that the property was destroyed by negligence of defendant, and without fault of the owners or plaintiff, denied generally in the answer, is not sufficient to raise the issue of contributory negligence of plaintiff. This allegation is surplusage and need not be proved.—*Orient Insurance Co. v. Northern Pac. Ry. Co.*, 502.

#### Pollution of Streams—Injury to Lands and Crops—Proof.

46. In order to permit a recovery for injury to crops and for permanent injury to the land on which the crops were raised, it should be distinctly and unequivocally alleged and proven on what date the permanent injury to the land took place, how much of the land was permanently injured, and the annual injury to crops prior to that date.—*Watson et al. v. Colusa Parrot M. & S. Co.*, 513.

#### Complaint—Objection—Appeal.

47. *Obiter*: An objection to a complaint, not made in the district court, will not be considered on appeal.—*McConnell et al. v. Combination M. & M. Co.* (on rehearing), 563.

#### Demurrers—Complaint—Waiver.

48. Under Code of Civil Procedure, Section 685, the defendant, charging in a demurrer to a complaint that it did not state facts sufficient to consti-

tute a cause of action, but not interposing an objection on the ground that the complaint was ambiguous and uncertain, must be deemed to have waived the latter objection.—*Pryor v. City of Walkerville*, 618.

#### Complaint—Contributory Negligence—Defense.

49. Where the complaint, in an action to recover damages for personal injuries, does not show that plaintiff was "free from any contributory negligence," but alleges that she was injured "without any fault or negligence on her part," the existence of contributory negligence is a matter of defense.—*Pryor v. City of Walkerville*, 618.

#### Findings—Issues—Harmless Error.

50. The submission of issues not raised by the pleadings is harmless, when the findings thereon, in view of the authorized findings, are immaterial, so far as the ultimate rights of the parties are concerned.—*Spencer v. Spencer*, 631.

### PREScription.

#### Water Rights—Requisites.

1. In order to obtain a right by prescription, it is necessary that during the prescriptive period an action could have been maintained by the party against whom the claim is made.—*Chessman v. Hale*, 577.

#### Water Rights—Limitations.

2. A right by prescription is limited by the character and extent of the user during the period requisite to acquire the right.—*Chessman v. Hale*, 577.

### PRESUMPTIONS.

#### Nonsuit.

1. Upon a motion for nonsuit, everything is deemed proved which the evidence tends to prove.—*Davies v. City of Great Falls*, 9.

#### Appeal—Judgment—Record.

2. Under Code of Civil Procedure, Section 1736, on an appeal from a final judgment, it will be presumed, in the absence of a showing to the contrary, that a statement disclosed by the record before the supreme court as prepared, settled and filed according to law was actually used upon the motion for a new trial, where it also appears that a decision on the motion was made.—*Mahoney v. Dixon et al.*, 107.

#### Mortgages—Statutes.

3. There not being in this state any restriction placed by law upon the mortgaging of any species of personal property, all such mortgages are exempted from the operation of Section 4491 of the Civil Code, which provides that a transfer of certain personal property and every lien thereon, other than a mortgage "when allowed by law," is conclusively presumed to be fraudulent under certain circumstances, and the words "when allowed by law" are therefore superfluous.—*Stewart v. Hoffman* (on rehearing), 190.

#### Libel—*Per Se*—Nominal Damages.

4. Where a false and unprivileged publication possessing the ingredients that stamp it as libelous *per se* is established, injury is presumed to ensue therefrom, and affords ground for the allowance of at least nominal damages.—*Paxton v. Woodward*, 195.

## Justice Courts—Summons.

5. The return on a justice's summons is presumed to show all that was done by the person making the service.—*State ex rel. Reagan v. Harrington*, 294.

## Lost Wills—Burden of Proof.

6. It being proved that a lost will was last seen in the possession of the testator, who was in the exercise of his mental faculties, the presumption is that he himself destroyed it *animo revocandi*, and the burden of proof is then on the proponent to overcome such presumption.—*In re Colbert's Estate*, 461.

## Lost Wills—Destruction by Testator—Proof.

7. To overcome the presumption that the testator destroyed a lost will, the proof must be clear, satisfactory and convincing.—*In re Colbert's Estate*, 461.

## Lost Wills—Declarations of Testator—Revocation.

8. Declarations of the testator, when not a part of the *res gestae*, are inadmissible, in conjunction with testimony of witnesses who had seen a lost will, to overcome the presumption of revocation from the fact that the will was last seen in his possession when he was in the exercise of his mental faculties.—*In re Colbert's Estate*, 461.

## Newly Discovered Evidence—Negligence.

9. Every presumption that he could have secured the testimony for the former trial will be indulged against the movant for a new trial on the ground of newly discovered evidence; hence he must negative any negligence on his part.—*In re Colbert's Estate* (on rehearing), 477.

## New Trial—Newly Discovered Evidence—Trial Court.

10. The trial court, having heard the testimony given by the witnesses *ore tenus* and observed their conduct and demeanor on the witness stand, is in a better position to weigh it than is the appellate court, and the presumption will be indulged, in the absence of any showing to the contrary, that its action in passing upon a motion for a new trial on the ground of newly discovered evidence, was based upon a due consideration of these conditions.—*In re Colbert's Estate* (on rehearing), 477.

## Results of One's Acts—Knowledge.

11. Every man is charged with the knowledge of the results of his own acts.—*Watson et al. v. Colusa-Parrot M. & S. Co.*, 513.

## Appeal—Transcript.

12. Where the transcript upon an appeal from a judgment does not contain any testimony, bill of exceptions, or statement on motion for a new trial, it must be presumed that the evidence supported the judgment, and that the instructions were based on the testimony.—*Pryor v. City of Walkerville*, 618.

## Executors—Compensation—Settlement of Accounts.

13. On appeal from an order settling the semi-annual account of an executor and from an order revoking his letters, it will be presumed, in the ab-

sence of anything in the orders on the subject, that upon a final settlement of the estate the proper compensation will be allowed to the executor for his services.—*In re Courtney's Estate*, 625.

#### PRIVILEGED COMMUNICATIONS.

See LIBEL, 8.

#### PROBATE COURTS.

See, also, EXECUTORS.

See, also, WILLS.

#### Appealable Orders.

1. Under Code of Civil Procedure, Section 1722, Subdivision 3, as amended by Laws of 1899, page 146, which enumerates the specific instances in which an appeal may be taken to the supreme court from a district court in probate proceedings, orders refusing to vacate a decree of distribution and settlement of final account, and refusing to vacate an order settling an administrator's account and discharging him, which are not among the judgments or orders enumerated in the statute, are not appealable.—*In re Kelly's Estate*, 356.

#### "Orders or Judgments"—"Final Judgments."

2. The term "final judgment" as used in Code of Civil Procedure, Section 1722, Subdivision 2, refers only to those judgments known at common law as final judgments, and has no application to the statutory determinations and orders termed "orders or judgments" in probate proceedings.—*In re Kelly's Estate* (on motion for rehearing), 356.

#### Jurisdiction—Real Property—Sale — Guardians—Insane Ward—Restoration to Capacity.

3. The district court, sitting as a court of probate, has no jurisdiction to entertain or grant an order for the sale of real property belonging to one who has been under guardianship because of mental incapacity, after such person has been judicially restored to capacity.—*In re Scheuer's Estate*, 606.

#### Jurisdiction—Limited.

4. District courts, sitting as courts of probate, are courts of special and limited jurisdiction, possessing no powers other than those expressly or by necessary implication conferred by statute.—*In re Scheuer's Estate*, 606.

#### PUBLIC LANDS.

#### Grant—How to be Construed.

1. A grant of public land must be construed in favor of the grantor.—*Story et al. v. Woolverton et al.*, 346.

#### Grant to State—Right to Use of Water.

2. The Act of Congress of February 13, 1891 (26 Statutes at Large, 748), granting to the state of Montana one section of land of an abandoned military reservation to be selected "so as to embrace the buildings and improvements thereon, to be used by the said state as a permanent militia campground," did not grant any right to the use of water which the government

## Justice Courts—Summons.

5. The return on a justice's summons is presumed to show all that was done by the person making the service.—*State ex rel. Reagan v. Harrington*, 294.

## Lost Wills—Burden of Proof.

6. It being proved that a lost will was last seen in the possession of the testator, who was in the exercise of his mental faculties, the presumption is that he himself destroyed it *animo revocandi*, and the burden of proof is then on the proponent to overcome such presumption.—*In re Colbert's Estate*, 461.

## Lost Wills—Destruction by Testator—Proof.

7. To overcome the presumption that the testator destroyed a lost will, the proof must be clear, satisfactory and convincing.—*In re Colbert's Estate*, 461.

## Lost Wills—Declarations of Testator—Revocation.

8. Declarations of the testator, when not a part of the *res gestae*, are inadmissible, in conjunction with testimony of witnesses who had seen a lost will, to overcome the presumption of revocation from the fact that the will was last seen in his possession when he was in the exercise of his mental faculties.—*In re Colbert's Estate*, 461.

## Newly Discovered Evidence—Negligence.

9. Every presumption that he could have secured the testimony for the former trial will be indulged against the movant for a new trial on the ground of newly discovered evidence: hence he must negative any negligence on his part.—*In re Colbert's Estate* (on rehearing), 477.

## New Trial Newly Discovered Evidence—Trial Court.

10. The trial court, having heard the testimony given by the witnesses *ore tenus* and observed their conduct and demeanor on the witness stand, is in a better position to weigh it than is the appellate court, and the presumption will be indulged, in the absence of any showing to the contrary, that its action in passing upon a motion for a new trial on the ground of newly discovered evidence, was based upon a due consideration of these conditions.—*In re Colbert's Estate* (on rehearing), 477.

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had diverted from a stream and used upon the land granted for domestic and irrigation purposes necessary to a military encampment.—*Story et al. v. Woolverton et al.*, 346.

#### Grant to State—Homicide—Jurisdiction.

3. *Held*, that neither title to, nor sovereignty over, that part of section 36, township 13, N. R. 20 W., upon which some of the buildings of Fort Missoula were erected, ever passed to the state of Montana under Act of Congress of February 22, 1880, granting land to the proposed state of Montana, and hence that the state court had no jurisdiction over a homicide committed on such part of said section 36.—*State v. Tully*, 365.

#### QUIETING TITLE.

See ADVERSE CLAIMS.

#### QUORUM.

See CORPORATIONS, 23.

#### RAILROADS.

##### Killing Live Stock—Statutes.

1. Civil Code, Section 950, applies only to live stock belonging to the owner or one in possession of land along or through which the railroad passes, which has been killed or maimed by the engines or cars of the railroad company upon that part of its road, said road being unfenced, or insufficiently fenced.—*Braudin v. Oregon Short Line R. R. Co.*, 238.

##### Killing Live Stock—Pleadings.

2. In an action against a railroad under Civil Code, Section 950, it is necessary that the petition allege plaintiff's ownership or possession of land along or through which the railroad runs, and that the stock was killed at such place.—*Braudin v. Oregon Short Line R. R. Co.*, 238.

##### Killing Live Stock—Replication—Admission.

3. In an action against a railroad under the statute, failure to deny an allegation of the answer that the place where the killing occurred was a public station amounted to an admission of such fact.—*Braudin v. Oregon Short Line R. R. Co.*, 238.

##### Killing Live Stock—Pleading—Negligence.

4. In an action under Civil Code, Section 950, no allegation of negligence in the operation of the train is necessary.—*Braudin v. Oregon Short Line R. R. Co.*, 238.

##### Fences—Station—Statutes.

5. The statute does not require a railroad to fence at a station.—*Braudin v. Oregon Short Line R. R. Co.*, 238.

##### Killing Live Stock—Evidence.

6. Where in an action against a railroad under Civil Code, Section 950, the only evidence was that the animals were found near the track, one

dead and the other injured so that it had to be killed, and no showing was made as to the character of the injuries except that one had its legs broken, such evidence was insufficient to show that the animals were killed by an engine or cars of defendant.—*Bcaudin v. Oregon Short Line R. R. Co.*, 238.

#### Burning Property—Locomotives—Sparks—Evidence.

7. In an action for the burning of property by sparks from a locomotive, a witness may testify how the quantity of sparks thrown by the engine at the time compared with that thrown by other engines along the road.—*Orient Insurance Co. v. Northern Pac. Ry. Co.*, 502.

#### Warehouses—Liability for Destruction—Evidence.

8. A railroad company is not relieved of liability for the burning of goods in a warehouse because the owners of the property were stockholders in the warehouse company—a corporation—though in its lease of the ground from the railroad company "it assumed all risk of loss to the building and contents occasioned by fire and sparks from locomotives," etc., and exclusion of evidence tending to show these matters was not error.—*Orient Insurance Co. v. Northern Pac. Ry. Co.*, 502.

#### RATIFICATION.

##### Corporations—Directors—Stockholders—Estoppel.

1. Where it does not affirmatively appear that plaintiff stockholders took part in a meeting or voted their stock, either in person or by proxy, they are not estopped to complain of an unauthorized act on the part of the directors alleged to have been ratified at such meeting.—*McConnell et al. v. Combination M. & M. Co.* (on rehearing), 563.

##### Corporations — Stockholders' Meetings — Ratification of Officers' Acts Without Information Thereon—Effect.

2. A resolution passed at a stockholders' meeting, called for the purpose of electing directors only, approving all the acts of the trustees and officers, is not a direct and substantive act on the part of the stockholders, done with the intention of ratifying the action of the board of trustees voting certain of their number salaries, when no statements are presented to the attending stockholders as to the condition of the company, and when it does not appear that they had been informed of the payment of such salaries.—*McConnell et al. v. Combination M. & M. Co.* (on rehearing), 563.

#### REAL ESTATE.

##### Mortgages—Liability of Purchaser.

1. The purchaser of mortgaged real estate does not thereby become personally liable for the indebtedness.—*Mueller v. Renkes*, 100.

##### Conveyances—From Daughter to Mother—Fraud—Insufficiency.

2. The mere fact that a conveyance of land is from a daughter to her mother, or *vice versa*, is not sufficient to stamp it with fraud.—*Mueller v. Renkes*, 100.

##### Sale—Probate Courts—Jurisdiction—Guardians—Insane Wards—Restoration to Capacity.

3. The district court, sitting as a court of probate, has no jurisdiction to entertain or grant an order for the sale of real property belonging to one

had diverted from a stream and used upon the land granted for domestic and irrigation purposes necessary to a military encampment.—*Story et al. v. Woolverton et al.*, 346.

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#### RECEIVERS.

##### Corporations—Reversal of Order—Purchasers—Involuntary Trustees.

1. Where the receiver of a corporation sold certain of its property, and thereafter the order appointing the receiver and authorizing a sale was reversed on appeal, the purchasers held the property and the proceeds of their sale thereof as involuntary trustees for the corporation, and the receiver held the purchase price as an involuntary trustee for the purchasers, under Civil Code, Sections 2958, 2959.—*Lutcy et al. v. Clark et al.*, 45.

##### Reversal of Order—Sale of Property—Recovery of Purchase Money.

2. Where orders appointing a receiver and directing a sale of property are reversed on appeal, the purchaser of the property, at a sale had pending the appeal, can recover purchase money paid although the purchased property in his possession has been subjected to the payment of the debts of the corporation for which the receiver was appointed.—*Lutcy et al. v. Clark et al.*, 45.

##### Appeal—Election—Corporations—Application of Property.

3. Where a corporation prosecuted an appeal from orders appointing a receiver and authorizing the sale of certain of its property on which such orders were reversed, such appeal constituted an election by the corporation to have the property restored to it or applied to its benefit, and the application of such property to judgments recovered against the corporation constituted an application of the property to the corporation's benefit.—*Lutcy et al. v. Clark et al.*, 45.

##### Supplementary Proceedings.

4. In supplementary proceedings it appeared that defendant was the owner of an order on a certain society, which she had forwarded to it for payment; and it was ordered that, on receipt of the amount of the order, defendant pay to the clerk of the court therefrom a sum sufficient to satisfy the judgment. *Held*, that the order was unauthorized, and the court should have appointed a receiver to collect the order and apply it to the judgment.—*In re Dourney*, 441.

#### RECORD.

See, also, PRESUMPTIONS.

TRANSCRIPT ON APPEAL.

##### Appeal from Judgment—Instructions.

1. Where defendant's motion for new trial was denied, and he appealed from the judgment alone, assignments of error referring to instructions not in the record as a part of the judgment roll, but in the statement on motion for new trial, cannot be considered.—*Dawes v. City of Great Falls*, 9.

##### Appeal—Evidence—Sufficiency.

2. Where it did not appear that the appeal record contained all the evidence introduced at the trial, or the substance thereof applicable to the errors assigned, the supreme court could not review the sufficiency of the evidence to sustain the verdict.—*Landt et al. v. Schneider*, 15.

**Appeal—Judgment—Dismissal.**

3. Appeal from a judgment will be dismissed, the record not containing a copy of the judgment, as required by Code of Civil Procedure, Section 1736, or showing that judgment has been entered, as required by Section 1722, as amended by Session Laws 1899, p. 146.—*Johns v. Barnes*, 426.

REDEMPTION.

**Of Corporate Property by Directors—When Not *Bona Fide*.**

1. A redemption, by the directors of a corporation of corporate property, sold under execution, could not be deemed fair and *bona fide* where the judgment under which the redemption was made was rendered in favor of one of their number only two days before the redemption, on a default based upon the acceptance of service of summons by another of their number.—*Coombs et al. v. Barker et al.*, 526.

**Of Corporate Property by Directors—Third Persons.**

2. One who joined with the directors of a corporation, knowing that they were directors, in the redemption of corporate property, was charged with knowledge of the principle of law that such directors could not redeem the property in their own names.—*Coombs et al. v. Barker et al.*, 526.

**By Agent.**

3. One who joins, through an agent, in the redemption of property is charged with all the knowledge that the agent possesses concerning the matter.—*Coombs et al. v. Barker et al.*, 526.

**Of Corporate Property—Directors—Third Persons—Fraud.**

4. One who was present at the time the redemption of property was agreed upon between directors of the corporation which owned the property, and who took part in the redemption, was charged with knowledge that the transaction was constructively fraudulent as against the corporation and its stockholders, and stood in no better position than the directors involved.—*Coombs et al. v. Barker et al.*, 526.

**Of Corporate Property—Agent—Good Faith—Evidence.**

5. Evidence held insufficient to show that one who joined with directors, through an agent, in redeeming corporate property was a *bona fide* purchaser for value, without notice of the unlawful acts of the directors, and for a valuable consideration paid before he acquired such notice.—*Coombs et al. v. Barker et al.*, 526.

**Directors—Redemption of Mining Property and Working Same as Their Own—Accounting.**

6. Where directors redeemed corporate mining property, sold under execution, and held and worked it as their own, they were entitled, on being sued by the stockholders, to obtain an accounting and to a credit for whatever money they had actually paid out for the use and benefit of the company, such as money paid for the redemption of the property, in satisfaction of *bona fide* claims against the same, with interest, and also for the reasonable expenses of extracting ore from the property after redemption.—*Coombs et al. v. Barker et al.*, 526.

## REFEREES.

## Executors—Accounts—Reports—Advisory Only.

1. The report and findings of a referee, appointed for the purpose of examining the account of an executor, hearing the objections thereto and making report thereon, are merely advisory to the court, and may be adopted, modified, or disapproved, as the court sees fit; and the court may, if it so desires, take further testimony, and make findings of its own on which to base its orders.—*In re Courtney's Estate*, 625.

## RESERVATIONS (Military).

## Criminal Law—Information—Venue.

1. An information stating generally that a crime was committed in Missoula county, but containing no other allegation as to venue, is sufficient; it not being necessary that it should allege that the crime was not committed on the Fort Missoula military reservation, which is situated within that county.—*State v. Tully*, 365.

## Judicial Notice.

2. Judicial notice may be taken of the fact that the Fort Missoula military reservation is situated in Missoula county.—*State v. Tully*, 365.

## Executive Orders Creating—Judicial Notice.

3. Under Section 3150, Code of Civil Procedure, the courts take judicial notice of executive orders of the federal government creating the Fort Missoula military reservation.—*State v. Tully*, 365.

## RULES OF SUPREME COURT.

For Rules promulgated February 1, 1905, see 30 Mont. xxix.

## SALES.

## Judicial—Executors.

1. Under Revised Statutes 1879, p. 233, Section 209, providing that, when authority is given in a will to sell property, the executor may sell without the order of the probate court, but must make a return of such sales as in other cases, and that no title passes until the sale is confirmed by the court, a private sale by an executrix under a power in the will to manage the estate as she should deem best, and for that purpose to sell any portion or the whole thereof, which is afterwards confirmed by the court, is not a judicial sale, but a sale under the power.—*Goodell v. Sanford et al.*, 163.

## Purchase—Title—Duty to Examine.

2. In the ordinary contract of purchase and sale there is an implication that the conveyance to be made thereunder will transfer the title to the property, but, in the absence of any special agreement, it is incumbent upon the vendee to examine the title for himself, and to point out any objections he may have to the title tendered him by the vendor.—*Goodell v. Sanford et al.*, 163.

## Executors—Trust Agreement—Estoppel.

3. Beneficiary vendees under a trust agreement, who assented thereto for years, entered into possession, sold portions of the property, made payments



on the price, and in all respects ratified the transaction between the purchasing syndicate, of which they were members, and the vendor, until sued for the balance of the price, were estopped from claiming that they received no title to the property, or that the sale, which was one by an executrix under a power, was irregularly made.—*Goodell v. Sanford et al.*, 163.

#### Trusts—Statute of Frauds—Agency.

4. Under Compiled Statutes 1887, p. 651, Section 217, providing that no trust or power concerning lands shall be created or declared, unless by act of law or by deed or conveyance in writing subscribed by the party creating or declaring the same, and Section 219 (page 652), providing that contracts for the sale of lands shall be void unless some note or memorandum expressing the consideration be made in writing and subscribed by the party to whom the sale is to be made, where a trust in land was declared on behalf of the members of a syndicate by the grantee of the land to secure the payment of the price to the grantor, such grantee, in signing the declaration, acted as the agent of the parties to the syndicate, and they were bound by the declaration, although they did not sign it.—*Goodell v. Sanford et al.*, 168.

#### Contract—Breach—Burden of Proof—Statutes.

5. Where the value of property involved in a sale is sufficient to bring the contract of sale within the provisions of Civil Code, Sections 2185, 2340, and Code of Civil Procedure, Section 3276, the burden is on plaintiff, in an action for breach of the contract, to establish by a preponderance of evidence that a valid contract under the statutes was entered into between the parties, together with a breach of such contract, and the consequent damages.—*Brophy v. Idaho Produce & Provision Co.*, 270.

#### Judicial—Corporations—Directors—Purchasers.

6. A director of a corporation may become a purchaser of its property at a judicial sale, when such sale is made by another creditor, and when the director has no control over the proceedings, or he may purchase from a purchaser at a judicial sale, but the acts of the purchasing director must be fair and honest, in either case, and he must not be permitted to obtain a dishonest advantage over the corporation or its stockholders.—*Coombs et al v. Barker et al.*, 526.

#### Delivery—Bill of Lading—Action for Price.

7. Defendant ordered of plaintiff lime which he wished to use on a certain date. Plaintiff did not place the lime on the car until six days thereafter, and after loading it, he received a letter from defendant countermanding the order. He could have recalled the shipment any time within twenty-four hours after receiving such letter, but did not. Plaintiff did not send defendant the bill of lading, having kept it, as he testified, until he could "see what was going to happen." Held, that the lime was not delivered, and defendant was not under any obligation to accept it on its arrival.—*McKelvey v. Perham*, 602.

### SCHOOLS.

#### County Superintendent—Qualifications—Applicable to Men and Women.

1. Political Code, Section 1744, declaring that no person shall be qualified for the office of county superintendent of schools unless he or she holds a certificate of the highest county grade, and is a citizen of the United States, etc., applies to men and women alike.—*State ex rel. Chenoweth v. Acton*, 37.

## County Superintendent—Qualifications.

2. The office of county superintendent of schools being an office created by the Constitution, it was incompetent for the legislature to prescribe by Political Code, Section 1744, as an additional qualification to those prescribed by the Constitution, that an aspirant to such office should be the holder of a teacher's certificate of the highest county grade.—*State ex rel. Chenoweth v. Acton*, 37.

## SET-OFF.

## Judgments—Conversion—Remedy.

1. Under Code of Civil Procedure, Section 601, providing that a counter-claim must arise out of the transaction set forth in the complaint as the foundation of plaintiff's claim, or connected with the subject of the action, a judgment cannot be set off against an action of conversion, but defendant's remedy is by bill in equity or other proceeding to offset one judgment against the other.—*Potter v. Lohac*, 91.

## Different Items—Date of Credit.

2. A set-off, made up of different items, should be credited as of the dates of the respective items.—*Goodell v. Sanford et al.*, 163.

## SIDEWALKS.

See MUNICIPAL CORPORATIONS, 4.

## SPECIFICATION OF ERRORS.

See BILL OF EXCEPTIONS, 2.  
APPEAL, 19.

## SPECIFIC PERFORMANCE.

Action *in Personam*.

1. An action for specific performance of a contract to convey real estate is a proceeding *in personam*.—*Silver Camp Mining Co. et al. v. Dickert*, 488.

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## STATUTE OF FRAUDS.

## Leases—Extension for More Than One Year.

1. Where one of several lessors of a building had no written authority to sign an extension agreement containing an agreement for a conveyance of

the land, for one of the other lessors, as required by Civil Code, Section 2185, Subdivision 5, such extension agreement, which was for more than a year, was invalid.—*Landt et al. v. Schneider*, 15.

Leasehold Interest—Promise to Secure.

2. Where plaintiff purchased a leasehold interest, paid the consideration, and went into possession of the premises with defendants' consent, and the promise to obtain the transfer of the lease was the inducement to sign a contract, omitting mention of the lease, on the sale of a business, defendants, without placing plaintiff in *statu quo*, could not assert that the promise to procure the lease was void under the statute of frauds.—*Sathre v. Rolfe et al.*, 85.

Trusts—Real Estate—Agency.

3. Under Compiled Statutes 1887, p. 651. Section 217, providing that no trust or power concerning lands shall be created or declared, unless by act of law or by deed of conveyance in writing subscribed by the party creating or declaring the same, and Section 219 (page 652), providing that contracts for the sale of lands shall be void unless some note or memorandum expressing the consideration be made in writing and subscribed by the party to whom the sale is to be made, where a trust in land was declared on behalf of the members of a syndicate by the grantee of the land to secure the payment of the price to the grantor, such grantee, in signing the declaration, acted as the agent of the parties to the syndicate, and they were bound by the declaration, although they did not sign it.—*Goodell v. Sanford et al.*, 163.

Promise to Pay Debt—Consideration—Evidence.

4. Defendants, for the purpose of showing that the promise of plaintiff's firm to pay a debt owing them by a corporation was for a valuable consideration, and so not within the statute of frauds, may show the value of the business of the agency they gave on condition of such promise.—*McCormick v. Johnson et al.*, 266.

Answer—Amendment—Replication.

5. Under Code of Civil Procedure, Section 1528, the filing of an amendment to defendant's answer pleading the statute of frauds to an action to recover the price of certain land sold did not require a replication.—*Duane v. Molinak*, 343.

Pleadings—Amendment—Appeal.

6. Where, in an action to recover a balance on a contract for the purchase of land, defendant answered, denying the allegations of the complaint, and alleging damages on account of certain misrepresentations as a counterclaim, such answer was not superseded by an amendment subsequently filed by defendant, after an appeal had been taken from the police court to the district court, pleading the statute of frauds as an affirmative defense.—*Duane v. Molinak*, 343.

Pleadings—Judgment—Issue of Fact.

7. Where an action was brought in the police court to recover a balance due on a sale of land, and defendant answered, denying the allegations of the complaint, and alleging as a counterclaim damages arising from certain misrepresentations of plaintiff, and on appeal from the police court pleaded the statute of frauds by amendment, such pleadings raised issues of fact to be tried in the ordinary manner, and it was therefore error for the court to render judgment for defendant on the pleadings.—*Duane v. Molinak*, 343.

## STATUTORY CONSTRUCTION.

## Constitutionality—Elections—Tie Vote—Appointment.

1. Political Code, Section 1171, providing that in case of a tie vote for a county officer, except county commissioner, the county commissioners shall appoint some eligible person to fill the office, as in case of other vacancies in such office, in so far as it relates to officers named in Constitution, Article XVI, Section 5, providing that such officers shall hold their offices for two years, and until their successors are elected and qualified, is invalid as in contravention of such section.—*State ex rel. Chenoweth v. Acton*, 37.

## County Superintendent of Schools—Who Eligible.

2. Political Code, Section 1744, declaring that no person shall be qualified for the office of county superintendent of schools unless he or she holds a certificate of the highest county grade, and is a citizen of the United States, etc., applies to men and women alike.—*State ex rel. Chenoweth v. Acton*, 37.

## County Superintendent of Schools—Qualifications.

3. The office of county superintendent of schools being an office created by the Constitution, it was incompetent for the legislature to prescribe by Political Code, Section 1744, as an additional qualification to those prescribed by the Constitution, that an aspirant to such office should be the holder of a teacher's certificate of the highest county grade.—*State ex rel. Chenoweth v. Acton*, 37.

## Guardians—Authority Over Estate of Ward.

4. The authority of a guardian of an incompetent over the person or estate of the ward is not extended by Code of Civil Procedure, Section 2972, to the time when he is "legally discharged" by an order of court, but such guardianship is, under Section 2973 of the same Code, terminated, *ipso facto*, by the judicial determination that the ward is of sound mind, and the adjudication of his restoration to capacity.—*In re Schuener's Estate*, 606.

## Wills—Probate—Settlement of Estates.

5. The probate of wills and the settlement of estates are not governed by the general law relating to actions, proceedings and judgments, but are, in the main, provided for by statute, and, in so far as the statute has spoken, its declarations are final.—*Spencer v. Spencer*, 631.

## STOCK AND STOCKHOLDERS.

See CORPORATIONS.

## STREAMS.

See WATERS and WATER RIGHTS.

## SUBROGATION.

## Chattel Mortgages—Sale—Purchaser.

1. A *bona fide* purchaser of property for value from a pledgee of the same, who sold it in violation of the pledge, succeeds to all the rights of the pledgee, and under Civil Code, Section 4602, which makes the rule the same when the reason is the same, a purchaser from a chattel mortgagee will



likewise succeed to the rights of his grantor with respect to the property purchased, on the principle of subrogation, although there is no contract of assignment between him and his grantee.—*Potter v. Lohse*, 91.

Equitable Defense—Legal Cause of Action.

2. Subrogation—an equitable defense—may be pleaded to a legal cause of action.—*Potter v. Lohse*, 91.

SUMMONS.

Statutes—Service—Non-Official Person—Justice Courts.

1. Code of Civil Procedure, Section 1688, as amended by Session Laws 1899, page 138, providing for the appointment of a special constable where no constable is elected or appointed to act in certain cases, did not affect Section 1510, authorizing a non-official person to serve a justice's summons.—*State ex rel. Reagan v. Harrington*, 294.

Justice Courts—Jurisdiction—Complaint—Copy.

2. The service of a justice's summons without a copy of the complaint gives no jurisdiction of defendant.—*State ex rel. Reagan v. Harrington*, 294.

Return—Presumptions.

3. The return on a justice's summons is presumed to show all that was done by the person making the service.—*State ex rel. Reagan v. Harrington*, 294.

Service—Complaint—Two or More Defendants.

4. Code of Civil Procedure, Section 635, provides that "a copy of the complaint must be served with the summons unless two or more defendants reside in the same county, in which case a copy of the complaint need only be served on one of such defendants." *Held*, that where several defendants reside in the same county, and a copy of the complaint is served on one of them with the summons, a return of service need not show that defendants all reside in the county.—*Mantle v. Casey et al.*, 408.

Action to Quiet Title—Service on One Defendant—Effect.

5. Where all the defendants in an action to quiet title, residing in the same county, were served with summons, and one defendant was served with a copy of the complaint as required by Code of Civil Procedure, Section 635, the fact that such defendant filed a disclaimer of any interest in the land did not affect the service on the other defendants; there being nothing to show that he was not made a defendant in good faith.—*Mantle v. Casey et al.*, 408.

Special Appearance—Effect on Time to Answer.

6. Under Code of Civil Procedure, Section 1020, providing that "if no answer has been filed within the time specified by the summons, or such further time as may have been granted, the clerk must enter the default of defendant," a special appearance for the purpose of moving to quash the service of summons did not extend the time for a general appearance and answering to the merits.—*Mantle v. Casey et al.*, 408.

Special Appearance—Effect on Time to Answer—Default.

7. The failure of defendant's counsel to know that a special appearance to move to quash the service of summons did not extend the time for a general

appearance and answer, is not such surprise or excusable neglect as is contemplated by Code of Civil Procedure, Section 774, as a reason for setting aside a default.—*Mantle v. Casey et al.*, 408.

**By Publication—Actions in Personam.**

8. Service of summons by publication on a nonresident defendant under Code of Civil Procedure, Section 638, will not warrant a judgment *in personam* against defendant who appears specially to challenge the jurisdiction of the court.—*Silver Camp Mining Co. et al. v. Dickert*, 488.

**By Publication—Actions in Personam—Common Law Rule.**

9. A general statute providing for the publication of summons in civil actions (Code of Civil Procedure, Section 637) does not abrogate the common law rule which requires personal service of summons in actions *in personam*.—*Silver Camp Mining Co. et al. v. Dickert*, 488.

**SUPERVISORY CONTROL.**

**Contempt—Alimony—Modification of Order.**

1. One ordered to pay alimony, to protect himself from contempt proceedings for noncompliance therewith because of stress of circumstances, should apply for revocation or modification of the order, and, upon failure of such application to the district court, the writ of supervisory control will not lie to relieve him from punishment for non-compliance with such order.—*State ex rel. Bordeaux v. District Court et al.*, 511.

**SUPPLEMENTARY PROCEEDINGS.**

**Order—Directing Debtor to Make Payment—Receivers.**

1. In supplementary proceedings it appeared that defendant was the owner of an order on a certain society, which she had forwarded to it for payment; and it was ordered that, on receipt of the amount of the order, defendant pay to the clerk of the court therefrom a sum sufficient to satisfy the judgment. *Held*, that the order was unauthorized, and the court should have appointed a receiver to collect the order and apply it to the judgment.—*In re Dourney*, 441.

**Contempt—Habeas Corpus.**

2. Where in supplementary proceedings the court erroneously ordered that defendant satisfy plaintiff's judgment out of the proceeds of an order on a certain society payable to defendant, instead of appointing a receiver to collect the order and make the application, and defendant was committed for contempt for failing to comply with the order, the court having had jurisdiction of the supplementary proceedings and of the person of defendant, defendant could not obtain release from custody on *habeas corpus*, irrespective of any question as to the appealability of the order.—*In re Dourney*, 441.

**SUPREME COURT.**

**Bill of Exceptions—Evidence—Sufficiency—Review.**

1. Under a statute providing that in the settlement of statements and bills of exceptions the court shall eliminate all immaterial evidence, if a bill of exceptions or statement appears to contain all material evidence, or

the substance thereof, given on the trial of the case, referring to the points brought before the supreme court for review, that court has full power to consider the sufficiency of the evidence, if properly specified as a ground of error.—*Handley v. Sprinkle*, 57.

**Review in Equity Cases—Evidence Preponderating in Favor of Findings.**

2. Under Laws of Second Extraordinary Session, 1903, p. 7, authorizing the supreme court to review all questions of fact and law in equity cases, in a suit to determine water rights the findings will not be disturbed because of the erroneous admission of evidence, where the remainder of the evidence preponderates in favor of the findings.—*Hays v. Buzard et al.*, 74.

**SURETIES.**

**Constables—When Improper Parties.**

1. The action of claim and delivery lies only against the party in possession, and when brought against a constable for the wrongful seizure of property under a writ of execution, the sureties on his official bond are improperly joined as parties defendant, where they were not in any manner concerned with the seizure or detention of the property.—*Gallick v. Bordeaux et al.*, 328.

**TELEGRAMS.**

**Master and Servant—Agency—Medical Services.**

1. In an action against a master for medical services rendered a servant who was injured while performing his duties, it appeared that one W. telegraphed to defendant from the place where the injury occurred, asking whether defendant would pay the "doctor's bill." Defendant answered by wire to the sender of the former message. Held that, since W. initiated the correspondence, the telegraph company was his agent, and not that of defendant, and hence defendant's reply telegram delivered to the company for transmission was the original, for evidentiary purposes, and not the reply telegram delivered by the telegraph company to W.—*Bond v. Hurd*, 314.

**Evidence—Original—Copy—Burden of Proof.**

2. Where plaintiff relied on a telegram the burden was on him to prove the loss of the original, to authorize the admission of a copy.—*Bond v. Hurd*, 314.

**TENANTS-IN-COMMON.**

**Partition—Dower—Wife of Tenant-in-Common—Indispensable Party.**

1. Under Code of Civil Procedure, Section 1342, the wife of a defendant tenant-in-common, having an inchoate right of dower in an undivided share of the property, is an indispensable party to a suit for partition.—*Hurley v. O'Neill*, 595.

**TORTS.**

See, also, NUISANCES.

**Evidence—Conjecture—Jury.**

1. Competent evidence must be produced of all facts, necessary to a recovery of damages in actions upon torts, upon which the jury may base a reasonably reliable conclusion, and nothing must be left to mere conjecture.—*Watson et al. v. Colusa-Parrot M. & S. Co.*, 513.

## TRANSCRIPTS ON APPEAL.

See, also, APPEAL, 1, 2, 10, 13., 18, 19, 27, 33, 34.

See, also, RECORD.

## TRUSTS AND TRUSTEES.

See, also, SALES, 4.

## Receivers—Corporations—Purchasers of Property.

1. Where the receiver of a corporation sold certain of its property, and thereafter the order appointing the receiver and authorizing a sale was reversed on appeal, the purchasers held the property and the proceeds of their sale thereof as involuntary trustees for the corporation, and the receiver held the purchase price as an involuntary trustee for the purchasers, under Civil Code, Sections 2958, 2959.—*Lutcy et al. v. Clark et al.*, 45.

## Action—Trust Agreement.

2. An action on a trust agreement, which authorized the trustee to sell the interest of a defaulting party at public auction and apply the net proceeds of the sale upon the payment of the amount due from such defaulting party to plaintiff, and giving plaintiff an action against such defaulting party for the balance remaining due after such application, accrued when the trustee sold the property under the terms of the declaration of trust.—*Goodell v. Sanford et al.*, 163.

## Corporations—Directors—Profits.

3. If by their acts the directors of a corporation have received any profits from the company's property or business, they hold the same as trustees for the benefit of the corporation and its stockholders.—*Coombs et al. v. Barker et al.*, 561.

## Corporations—Directors - Relations to Stockholders.

4. As to the stockholders of a corporation, the directors are trustees, besides being agents of the company and stockholders, and are not permitted to so deal with the trust property as to secure therefrom a profit to themselves.—*McConnell et al. v. Combination M. & M. Co.* (on rehearing). 563.

## UNDERTAKING ON APPEAL.

See APPEAL, 27.

## VACANCIES.

See ELECTIONS, 3, 4, 10.

## VARIANCE.

## Appeal.

1. On appeal the court will not consider the question of alleged variance between the proof and complaint, not called to the attention of the court below.—*Dawes v. City of Great Falls*, 9.

## Equity—Fraud—Mistake at Law.

2. Civil Code, Section 2123, provides that a court of equity will relieve against a mistake of law when it arises (1) from a misapprehension of the

law by all parties by supposing that they knew or understood it, and by making substantially the same mistake, or (2) a misapprehension of the law by one party of which the others are aware at the time of contracting, but which they do not rectify. *Held*, that where plaintiff brought suit under the second subdivision to recover an overpayment made on a repurchase of property sold under foreclosure, and alleged that she made the payment under misapprehension as to her legal right to redeem, and that the payment was caused to be made through the fraud, conspiracy and deceitful practices of the defendants, but the proof showed that whether plaintiff had a right of redemption at the time was a mooted question of law, and that defendants acted in good faith in their contention that her right of redemption was barred, there was a fatal variance.—*Bottego v. Carroll et al.*, 122.

# VENUE.

See, also, CHANGE OF VENUE.

## Criminal Law—Information—Military Reservations.

1. An information stating generally that a crime was committed in Missoula county, but containing no other allegation as to venue, is sufficient; it not being necessary that it should allege that the crime was not committed on the Fort Missoula military reservation, which is situated within that county.—*State v. Tully*, 365.

# VERDICT.

## Findings—Evidence—Conflict.

1. Where there is a substantial conflict in the evidence, a verdict or finding will not be disturbed on appeal.—*Spencer v. Spencer*, 631.

# VERIFICATION.

## Complaint—Objections—When to be Made—Appeal.

1. An objection to the verification of a complaint cannot be made for the first time in the appellate court.—*Pryor v. City of Walkerville*, 618.

# WAIVER.

## Premature Action—Objection.

1. An objection that the proceeding is prematurely brought is waived by counsel of respondent appearing and asking that the rights of the parties be adjudicated.—*State ex rel. Riley v. Weston*, 218.

## Complaint—Defect.

2. Where the complaint in an action to recover a sum alleged to be due plaintiff for a privilege granted defendant to sell certain articles in a certain territory was defective with reference to an allegation of nonpayment by defendant, the defect was cured by defendant's answer admitting nonpayment.—*Harmon v. Fox*, 324.

## Pollution of Streams—Complaint—Evidence—Recovery.

3. By failing to introduce evidence in support of an allegation that damages had been caused by pollution of water so as to render it unfit for a particular use, recovery is waived thereon.—*Watson et al. v. Colusa-Parrot M. & S. Co.*, 513.

## Nuisances—Action for Damages—Jury Trial—How Waived.

4. Under Constitution, Article III, Sections 23 and 29, and Code of Civil Procedure, Section 1110, prescribing the manner in which a jury in a civil case may be waived, plaintiff's right to a jury trial in an action for damages for a nuisance could only be waived in one of the modes specified, and was not waived by his failure to demand a trial by jury, or to submit to the court the question as to whether he had a right to a jury trial, or by endeavoring to maintain his claim under the theory of the case which the court, by its ruling that it was an action in equity, compelled him to adopt.—*Chessman v. Hale*, 577.

## Refusal of Instruction—Reason Given by Court—Exceptions.

5. It is not necessary to take an exception to the reason given by the trial court for refusing an instruction, and by proceeding with the trial after such refusal a party does not waive his exception, but the action of the court is deemed excepted to under Code of Civil Procedure, Section 1080, as amended by Session Laws of 1901, page 160.—*Chessman v. Hale*, 577.

## Pleadings—Demurrers—Complaint.

6. Under Code of Civil Procedure, Section 685, the defendant, charging in a demurrer to a complaint that it did not state facts sufficient to constitute a cause of action, but not interposing an objection on the ground that the complaint was ambiguous and uncertain, must be deemed to have waived the latter objection.—*Pryor v. City of Walkerville*, 618.

## WAREHOUSES.

## Corporations—May be Organized.

1. Under Subdivision 25 of Section 393 of the Civil Code, a corporation may be organized for the purpose of storing goods in a warehouse for shipment.—*Orient Insurance Co. v. Northern Pac. Ry. Co.*, 502.

## Railroads—Liability for Destruction—Evidence.

2. A railroad company is not relieved of liability for the burning of goods in a warehouse because the owners of the property were stockholders in the warehouse company—a corporation—though in its lease of the ground from the railroad company "it assumed all risk of loss to the building and contents occasioned by fire and sparks from locomotives," etc., and exclusion of evidence tending to show these matters was not error.—*Orient Insurance Co. v. Northern Pac. Ry. Co.*, 502.

## WARRANTY.

## Leases—That Premises Are Suitable for Certain Purposes.

1. In the absence of statute or agreement, there is no implied warranty that leased premises are suitable for the purpose for which they are demised.—*Landt et al. v. Schneider*, 15.

## Leases—That Lessor Will Keep Premises in Repair.

2. In the absence of statute or agreement, there is no implied warranty that the lessor will keep the leased property in repair.—*Landt et al. v. Schneider*, 15.

## WATERS AND WATER RIGHTS.

## Use of Water on Rented Land—Effect.

1. Where a person owning a water right, rents land and uses a portion of the water on the land, such use of the water will not, of itself, furnish any ground for the inference that he intended to make his water right or any portion of it appurtenant to the land.—*Hays v. Buzard et al.*, 74.

## Appurtenant to Land—Proof.

2. A person asserting that a water right and a ditch are appurtenant to certain land must prove that they are appurtenances and must connect himself with the title of the prior appropriator.—*Hays v. Buzard et al.*, 74.

## Deed—What Rights Conveyed.

3. A deed of land together with all appurtenances, water rights and water ditches to the same belonging, and all the estate, title, interest, claim or demand of the grantor therein, conveys only such water rights as are appurtenant to the land.—*Hays v. Buzard et al.*, 74.

## Appurtenant to Land—Evidence.

4. Evidence examined and held, to justify the trial court in finding that a certain water right was not appurtenant to a particular piece of land.—*Hays v. Buzard et al.*, 74.

## Conveyance—Appurtenances—Evidence.

5. Where plaintiff in a suit to determine water rights asserted rights under a deed conveying all the appurtenances, water rights and water ditches, and all the interest of the grantor, evidence showing the exclusive use of the water by defendants for ten years, during which time neither plaintiff nor his immediate predecessor asserted any right thereto, justified the conclusion that plaintiff's claim was not well founded.—*Hays v. Buzard et al.*, 74.

## Right of Owner of Land—Source of Water.

6. The mere fact that water has its source on land owned by a person does not of itself necessarily give him the exclusive right thereto, so as to prevent others from acquiring rights therein under the laws of this state.—*Quinlan v. Calvert*, 115.

## Grant of Land to State—Use of Water Not Included.

7. The Act of Congress of February 13, 1891 (26 Statutes at Large, 748), granting to the state of Montana one section of land of an abandoned military reservation to be selected "so as to embrace the buildings and improvements thereon, to be used by the said state as a permanent militia camp-ground," did not grant any right to the use of water which the government had diverted from a stream and used upon the land granted for domestic and irrigation purposes necessary to a military encampment.—*Story et al. v. Woolverton et al.*, 346.

## Pollution of Streams—Mining and Reduction—Nuisances—Liability.

8. Where a nuisance arises from the individual acts of different mining and reduction companies, which have discharged deleterious and poisonous matter into the waters of a creek, and the injury is not caused by the joint acts of defendant and any other corporation, each company is liable to the person injured for the damage caused by its own wrongful acts, and none

other, and the full damage must be apportioned among all the wrongdoers.—*Watson et al. v. Colusa-Parrot M. & S. Co.*, 513.

**Pollution of Streams—Mining and Reduction—Damages—Difficulty of Ascertaining.**

9. The mere fact that it is difficult to determine what part of the damage was occasioned by the acts of the defendant mining and smelting company, in an action for damages for injury to lands by the pollution of a stream, it appearing that other like companies contributed to the injury, is no objection to the relief asked.—*Watson et al. v. Colusa-Parrot M. & S. Co.*, 513.

**Pollution of Streams—Measure of Damages.**

10. The measure of damages for permanent injury to land, resulting from the poisoning of the waters of a stream, whereby its value for agricultural purposes is absolutely destroyed, is the difference between the value of the land prior to the injury and its value after the injury.—*Watson et al. v. Colusa-Parrot M. & S. Co.*, 513.

**Pollution of Streams—Complaint—Evidence—Waiver.**

11. By failing to introduce evidence in support of an allegation that damages had been caused by pollution of water so as to render it unfit for a particular use, recovery is waived thereon.—*Watson et al. v. Colusa-Parrot M. & S. Co.*, 513.

**Pollution of Streams—Damages Recoverable—For What Period.**

12. Where several years elapse before a total and permanent injury to lands for agricultural purposes by the pollution of a stream is completed, the owners are entitled to recover damages for the yearly injury to their crops caused by the continuing nuisance, until the land was so totally and permanently injured; but no damages are recoverable for damages to the crops after such permanent injury.—*Watson et al. v. Colusa-Parrot M. & S. Co.*, 513.

**Pollution of Streams—Injury to Lands—Pleadings—Proof.**

13. In order to permit a recovery for injury to crops and for permanent injury to the land on which the crops were raised, it should be distinctly and unequivocally alleged and proven on what date the permanent injury to the land took place, how much of the land was permanently injured, and the annual injury to crops prior to that date.—*Watson et al. v. Colusa-Parrot M. & S. Co.*, 513.

**Pollution of Streams—Injury to Lands—When Suit May be Brought.**

14. In order to recover damages, resulting from a nuisance, for total and permanent injury to land, caused by pollution of a stream, such injury must have been completed before suit can be brought.—*Watson et al. v. Colusa-Parrot M. & S. Co.*, 513.

**Pollution of Streams—Damages Recoverable—By Whom.**

15. Owners of agricultural lands cannot recover for injuries arising from a destruction of crops, by reason of pollution of the waters of a stream, prior to the date when they acquired title to the lands, unless they were then in possession or entitled to possession thereof.—*Watson et al. v. Colusa-Parrot M. & S. Co.*, 513.



## Pollution of Streams—Non-Expert Witness—Opinion Evidence.

16. In an action for damages caused by the pollution of a stream, testimony of non-expert witnesses as to the effect of the water on land and crops is not objectionable as opinion evidence.—*Watson et al. v. Colusa-Parrot M. & S. Co.*, 513.

## Pollution of Streams—Witnesses—Cross-Examination.

17. In an action for damages caused by the pollution of a stream, a question asked a witness, who produced a sample of water from the stream, as to whether he did not know that the sewerage of a city was dumped into the stream at the place where he procured the sample, should have been allowed on cross-examination.—*Watson et al. v. Colusa-Parrot M. & S. Co.*, 513.

## Placer Mining—Pollution of Streams—Injury to Land.

18. Under Civil Code, Sections 1880 and 4605, an appropriator of an upper water right who, in a contract to deliver it to a lower owner of land at a certain place, has reserved to himself the right to use the water for placer mining purposes, acquires no title to the water itself, or any right to pollute the water to any greater extent than is permitted by law; and, while he has a right to a reasonable use of the water for the purposes specified, although such use does result in fouling it to some extent, yet he cannot cover the lower proprietor's land with mining debris, so as to render it valueless.—*Chessman v. Hale*, 577.

## Right by Prescription—Requisites.

19. In order to obtain a right by prescription, it is necessary that during the prescriptive period an action could have been maintained by the party against whom the claim is made.—*Chessman v. Hale*, 577.

## Right by Prescription—Limitations.

20. A right by prescription is limited by the character and extent of the user during the period requisite to acquire the right.—*Chessman v. Hale*, 577.

## Use—Placer Mining—Nuisances.

21. The use of water by an upper appropriator in such a way as to carry sand, gravel and mining debris over the land of a lower proprietor, so as to render it valueless, constitutes a nuisance, both at common law and under Civil Code, Section 4550, and Code of Civil Procedure, Section 1300.—*Chessman v. Hale*, 577.

## WILLS.

See, also, EXECUTORS.

See, also, PROBATE COURTS.

## Power to Sell Real Estate—Executors.

1. A will authorizing the executrix to manage the estate as she should deem best, and to sell any portion or the whole thereof, and to invest the proceeds as she should deem fit, empowered the executrix to convey real property to a trustee, who was to hold for a syndicate, which was to plat the same, and under the terms of which sale the purchase price, secured by a lien on the property, was made payable in installments.—*Goodell v. Sanford et al.*, 163.

## Probate—Contests—Practice.

2. Under Code of Civil Procedure, Sections 2340-2346, the proponent of a will must first make out a *prima facie* case; that is, make such proof as would entitle the will to probate in the absence of a contest. The contestant then attacks its validity, the proponent defends the same, and the contestant rebuts the testimony of the proponent, who may sur-rebut any new testimony; but the contestant has the right to open and close.—*In re Colbert's Estate*, 461.

## Lost Wills—Presumptions—Burden of Proof.

3. It being proved that a lost will was last seen in the possession of the testator, who was in the exercise of his mental faculties, the presumption is that he himself destroyed it *animo revocandi*, and the burden of proof is then on the proponent to overcome such presumption.—*In re Colbert's Estate*, 461.

## Destruction by Testator—Presumptions—Proof.

4. To overcome the presumption that the testator destroyed a lost will, the proof must be clear, satisfactory and convincing.—*In re Colbert's Estate*, 461.

## Witness—Possession—Evidence.

5. Evidence that one who was alleged to be a witness to a lost will, but who denied the same, stated at the funeral of testator that he had the will in his pocket, did not tend to prove even remotely that the witness had it in his possession, no one ever having seen it in his possession so far as the testimony disclosed.—*In re Colbert's Estate*, 461.

## Lost Wills—Declarations of Testator—Presumption of Revocation.

6. Declarations of the testator, when not a part of the *res gestae*, are inadmissible, in conjunction with testimony of witnesses who had seen a lost will, to overcome the presumption of revocation from the fact that the will was last seen in his possession when he was in the exercise of his mental faculties.—*In re Colbert's Estate*, 461.

## New Trial—Newly Discovered Evidence—Affidavit—Sufficiency.

7. The uncontradicted affidavits for a new trial on the ground of newly discovered evidence in proceedings to establish a lost will showed diligence on the part of proponent, and that a newly discovered witness would testify that he was shown the will by the testator, and was familiar with its contents, and that after his death he was shown the will by, and recognized it in the hands of, a subscribing witness to the will, such evidence of its existence being the essential evidence which proponent lacked on the trial. *Held*, that the court abused its discretion in not granting a new trial.—*In re Colbert's Estate*, 461.

## Wills Probate—Settlement of Estates—Statutes.

8. The probate of wills and the settlement of estates are not governed by the general law relating to actions, proceedings and judgments, but are, in the main, provided for by statute, and, in so far as the statute has spoken, its declarations are final.—*Spencer v. Spencer*, 631.

## How Contested and Set Aside.

9. Where there is a proper subject-matter, neither the order admitting a will to probate, nor the order of final distribution, is void, and neither can be contested or set aside except in the manner and within the time fixed by statute.—*Spencer v. Spencer*, 631.

## Contests—In Whose Favor Operative.

10. The successful contest of a will, after probate and distribution of the estate, by a minor on coming of age, operates only in his favor, and not in favor of those heirs who have lost their right to contest by a failure to institute proper proceedings within the time allowed by Section 2306 of the Code of Civil Procedure.—*Spencer v. Spencer*, 631.

## Insanity—Non-Expert Witness—Opinion Evidence.

11. A non-expert witness, who detailed the circumstances relative to the mental condition of the testator for six months prior to the date of the will, upon which he based his conclusion that the decedent was not mentally competent to make a will, may give his opinion as to testator's competency.—*Spencer v. Spencer*, 631.

## WORDS AND PHRASES.

## "Adverse Party."—

*Merk et al. v. Bowery Mining Co.*, 304.

## "As between those in equal fault, the possessor's case is the better."—

*Glass v. Basin & Bay State Mining Co.*, 33.

## "Believe."—

*Spencer v. Hersam et al.*, 121.

## "Choice."—

*Brophy v. Idaho Produce & Provision Co.*, 287.

## "Claim."—

*Pollock M. & M. Co. v. Davenport*, 454.

## "Consolidation rule" of actions.—

*Handley v. Sprinkle*, 63.

## "Current expense."—

*Helena Water Works Co. v. City of Helena*, 247, 248.

## "Embrace."—

*Story et al. v. Woolverton et al.*, 354.

## "Every man is charged with the knowledge of the results of his own acts."—

*Watson et al. v. Colusa-Parrot M. & S. Co.*, 524.

## "Exclusive legislation."—

*State v. Tully*, 372.

## "Ex dolo malo non oritur actio."—

*Glass v. Basin & Bay State M. Co.*, 33.

## "Expressio unius est exclusio alterius."—

*State ex rel. Chenoiceth v. Acton*, 44.

## "Final judgment."—

*In re Kelly's Estate*, 359.

## "He who seeks equity must do equity."—

*Coombs et al. v. Barker et al.*, 561.

## "Ignorantia legis neminem excusat."—

*Mantle v. Casey et al.*, 416.

## "In pari delicto, potior est conditio defendentis."—

*Glass v. Basin & Bay State Mining Co.*, 33.

## "In pari delicto, melior est conditio possidentis."—

*Glass v. Basin & Bay State Mining Co.*, 33.

## "Nice."—

*Brophy v. Idaho Produce & Provision Co.*, 287.

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"Regular jurors."—

*State ex rel. Clark v. District Court et al.*, 436.

"Rely."—

*Spencer v. Hersam et al.*, 121.

"*Sic utere tuo ut alienum non laedas.*"—

*Quinlan v. Calvert*, 119.

*Watson et al. v. Colusa-Parrot M. & S. Co.*, 524.

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*State ex rel. Chenoweth v. Acton*, 40.

"Where the reason is the same, the rule should be the same."—

*Potter v. Lohse*, 96.

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